

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

UNITED STATES OF AMERICA,

Plaintiff,

And

NATURAL RESOURCES DEFENSE
COUNCIL, INC. AND SIERRA CLUB,

Intervenor-Plaintiffs,

v.

DTE ENERGY COMPANY AND
DETROIT EDISON COMPANY,

Defendants.

Civil Action No.
2:10-cv-13101-BAF-RSW

Judge Bernard A. Friedman

Magistrate Judge R. Steven Whalen

DEFENDANTS' MOTION FOR PROTECTIVE ORDER

Defendants DTE Energy Company and Detroit Edison Company, by counsel, respectfully submit this motion pursuant to Fed. R. Civ. P. 26(c) and Loc. R. 37.2 for a protective order that limits the scope of discovery in this case to the projects specifically identified in Plaintiff's ("EPA") section 113(a) Notice of Violation ("NOV"). The NOV is a jurisdictional prerequisite to suit.

As explained in the accompanying Memorandum of Law, EPA cannot expand its case to assert violations that are not specified in the NOV. By extension, it cannot expand discovery to encompass projects that are not at issue in the case. But EPA has made clear that it intends to expand its case to reach projects other than the three tube replacement projects that were specifically identified in the NOV and, until recently, have been the focus of EPA's case. To avoid undue delay and to allow for the efficient completion of discovery, Defendants respectfully

request that the Court enter a protective order that confines the case to the limits set by EPA itself in its NOV.

In accordance with Loc. R. 7.1(a)(2), counsel for Defendants conferred with counsel for EPA, and explained the nature of this motion and its legal basis. EPA did not concur in the relief sought.

Respectfully submitted, this 23rd day of March 2011.

HUNTON & WILLIAMS LLP

Matthew J. Lund (P48632)
Pepper Hamilton LLP
100 Renaissance Center, 36th Floor
Detroit, Michigan 48243
lundm@pepperlaw.com
(313) 393-7370

Michael J. Solo (P57092)
Office of the General Counsel
DTE Energy
One Energy Plaza
Detroit, Michigan
solom@dteenergy.com
(313) 235-9512

/s/ F. William Brownell
F. William Brownell
bbrownell@hunton.com
Mark B. Bierbower
mbierbower@hunton.com
Makram B. Jaber
mjaber@hunton.com
Brent A. Rosser
brosser@hunton.com
Hunton & Williams LLP
1900 K Street, N.W.
Washington, D.C. 20006-1109
(202) 955-1500
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2011, the foregoing **DEFENDANTS' MOTION FOR PROTECTIVE ORDER** was electronically filed with the Clerk of Court using the ECF system, which will automatically send notification to the following attorneys of record:

Ellen E. Christensen
U.S. Attorney's Office
211 W. Fort Street
Suite 2001
Detroit, MI 48226
313-226-9100
Email: ellen.christensen@usdoj.gov

James A. Lofton
Thomas Benson
Justin A. Savage
Kristin M. Furrie
U.S. Department of Justice
Environmental and Natural Resource Div.
Ben Franklin Station
P.O. Box 7611
Washington, DC 20044
202-514-5261
Email: thomas.benson@usdoj.gov
justin.savage@usdoj.gov
kristin.furrie@usdoj.gov
jim.lofton@usdoj.gov

Holly Bressett
Sierra Club Environmental Law Program
85 Second St., 2nd Floor
San Francisco, CA 94105
Phone: (415) 977-5646
Email: Holly.Bressett@sierraclub.org

Andrea S. Issod
Sierra Club
85 2nd Street, 2nd Floor
San Francisco, CA 94105
415-977-5544
Email: andrea.issod@sierraclub.org

/s/ F. William Brownell

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**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER**

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STATEMENT OF ISSUE PRESENTED

1. Section 113(a) of the Clean Air Act requires, as a mandatory jurisdictional prerequisite to suit for enforcement of violations of a State Implementation Plan, that Plaintiff (“EPA”) send a “Notice of Violation” to the Defendants and the State. In the context of a claim that an operator has performed a “major modification” without satisfying New Source Review permitting requirements, stating a violation requires EPA to specify the projects that it contends constitute major modifications.

Where EPA identified only three independent projects as “major modifications” undertaken by Detroit Edison in violation of Michigan’s SIP, can EPA expand its case to address projects not identified in its Notice of Violation?

Defendants’ Answer: No.

CONTROLLING OR OTHER APPROPRIATE AUTHORITY

The Jurisdictional NOV Requirement

United States v. AM General Corp., 808 F. Supp. 1353, 1362 (N.D. Ind. 1992)
United States v. Ford Motor Co., 736 F. Supp. 1539 (W.D. Mo. 1990)
United States v. Louisiana-Pacific Corp., 682 F. Supp. 1122 (D. Colo. 1987)
United States v. Louisiana-Pacific Corp., 682 F. Supp. 2d 1141 (D. Colo. 1988)
United States v. LTV Steel Co., 116 F. Supp. 2d 624 (W.D. Pa. 2000)
United States v. Pan American Grain Mfg. Co., 29 F. Supp. 2d 53 (D.P.R. 1998)

42 U.S.C. § 7413

The Scope of NSR Cases Involving Alleged “Major Modifications” Is Limited by the NOV

United States v. E. Ky. Power Cooperative, No. 5:04-cv-00034 (E.D. Ky. June 17, 2005)
United States v. Cinergy Corp., No. 1:99-cv-1693-LJM/VSS (S.D. Ind. March 21, 2005)

The Unit of Measure for NSR “Major Modification” Analysis

Nat’l Parks Conservation Ass’n, Inc. v. Tennessee Valley Authority, No. 3:01-CV-071, 2010 WL 1291335 (E.D. Tenn. Mar. 31, 2010)

57 Fed. Reg. 32,314, 32,326 (July 21, 1992)
71 Fed. Reg. 54,235, 54,244-54,248 (Sept. 14, 2006)
74 Fed. Reg. 2,376, 2,378 (Jan. 15, 2009)

PRELIMINARY STATEMENT

This motion asks the Court to confine EPA's case to the alleged violations specified in the mandatory "Notice of Violation" it sent to Defendants before filing suit. Before it could file this action against Defendants DTE Energy Company and Detroit Edison Company (collectively, "Detroit Edison"), EPA was required under section 113(a) of the Clean Air Act to provide Detroit Edison and the State of Michigan with a Notice of Violation that specified the violations of Michigan's Clean Air Act State Implementation Plan ("SIP")¹ that it believed Detroit Edison had committed. EPA served that Notice on June 4, 2010. (Ex. 1) In it, EPA identified three boiler tube projects (the "Tube Projects") that it contends constitute "major modifications" to Detroit Edison's Monroe Unit 2 undertaken without first satisfying New Source Review ("NSR") permitting requirements: (1) the replacement of the economizer; (2) the replacement of reheat pendants; and (3) the replacement of a section of waterwall tubes. These Tube Projects were performed during a planned outage at Monroe Unit 2 from March to June 2010 that included dozens of other routine repair and replacement projects.

Until recently, EPA has confined its case to the Tube Projects. The specific projects identified in the Complaint are the Tube Projects. The focus of its briefing on its motion for a preliminary injunction was the Tube Projects. The expert declarations that supported EPA's preliminary injunction motion focused on the Tube Projects. EPA, in its description of its claims in its portion of the parties' Rule 26(f) report, only identified the Tube Projects. And EPA's lawyers represented to the Court when advocating for an accelerated trial schedule that the evidentiary record developed during briefing on EPA's motion for preliminary injunction — which fo-

¹ At the Court's suggestion at the January 19, 2011 hearing, Detroit Edison is attaching as Ex. 11 a glossary of acronyms referenced in this brief.

cused exclusively on the Tube Projects — would need little supplementation.

But now, EPA has made clear that it intends to expand its case beyond the projects identified in its notice. It now contends that all of the work performed during the 2010 outage constitutes a single “project,” and that this “project” is the major modification that is the subject of this dispute. Having re-characterized its case in this way, EPA argues that it is entitled to expand discovery beyond the Tube Projects.

Section 113(a) limits this case to the three Tube Projects, because those are the “modifications” EPA identified in its NOV. The notice requirement is jurisdictional. “[T]o allow the EPA to notify the alleged offender of one violation, and then bring a civil action on the basis [of] another violation (different than that alleged in the notice) . . . would completely frustrate the notice requirement created by Congress.” *United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1122, 1128 (D. Colo. 1987) (“*Louisiana-Pacific I*”). Detroit Edison accordingly asks the Court to limit EPA’s case to the violations specified in the NOV and enter a protective order that limits EPA’s discovery to the Tube Projects that are properly the subject of this case.

BACKGROUND

I. Work Performed During the March - June 2010 Outage

Detroit Edison performed a number of distinct maintenance activities during the March - June 2010 outage (the “Outage”). Detroit Edison described the more significant activities in the March 12, 2010, Planned Outage Notification it sent to the Michigan Department of Environmental Quality (“MDEQ”):

The following activities will be performed during the outage scheduled to begin on or about March 13, 2010 . . . :

- **Boiler System Repairs and Replacements** — replacement of economizer tubes; replacement of reheat pendants; replacement of a section of water wall tubes and burner cells; and boiler tube chemical cleaning with the replacement of 210 valves. . . .

- **Turbine System Repairs and Replacements** — rewind MTG rotor; install static exciter; replacement of generator lead box; overhaul of north boiler feed pump turbine & rebuild south boiler feed pump; and install boiler feed pump TSI. . . .
- **Electrical System Repairs and Replacements** — Replace system service transformer #62; replace 4160V cables from system service transformers; rebuild 9-4160V circuit breakers. . . .
- **Draft & Fuel Burning Repairs and Replacements** — Replace ten air heater gas side expansion joint[s]. . . .

But this was not the only work that Detroit Edison performed. As is typical in the industry, Detroit Edison also performed a host of other routine maintenance, repair and replacement projects during the Outage. *See* Ex. 2, Monroe Power Plant Unit #2 2010 Periodic Outage Preparation Status Report at 6-7; Attachment A to Declaration of Jerry Golden (Docket Entry No. 46-10) at 57; *see also Nat'l Parks Conservation Ass'n v. Tennessee Valley Auth.*, No. 3:01-CV-71, 2010 WL 1291335, *9 (E.D. Tenn. Mar. 31, 2010) (describing the types of maintenance performed during a planned outage); Declaration of Alan Michael Hekking (Docket Entry No. 8-17) ¶ 24 (same).

II. EPA's Notice of Violation to Detroit Edison Focuses Only on the Tube Projects.

In the "Notice and Finding of Violation (Notice) under Section 113(a)(1) and 113(a)(3) of the Clean Air Act" ("Notice" or "NOV") that EPA sent Detroit Edison on June 4, 2010, EPA identified only three projects falling within the "Boiler System Repairs and Replacements" category as constituting major modifications performed in violation of Michigan's SIP. Specifically, in Paragraph 20 of the NOV, EPA states:

20. The construction activities that DTE commenced on or about March 13, 2010, include, but are not limited to the following work on the unit's boiler: [1] replacement of economizer tubes; [2] replacement of reheat pendants; and [3] replacement of a section of waterwall tubes and burner cells."

(Ex. 1 at 4.) In the next paragraph, EPA states its conclusion that these “replacement projects” are the “major modifications” that are the subject of the NOV:

21. EPA has calculated that the replacement projects identified in Paragraph [sic] 20 are major modifications under the Clean Air Act and the Michigan implementing regulations, as they will result in projected emissions increases in excess of 40 TPY of NO_x and SO₂.

(*Id.*) No other projects performed during the Outage (the “Non-Tube Projects”) are similarly identified as “major modifications.”

III. EPA’s Complaint Focuses Only on the Tube Projects.

In its Complaint, EPA again focused on boiler system tube replacements. In Paragraph 46, it alleges:

On or about March 13, 2010, DTE began a major overhaul project at Monroe Unit 2. This overhaul project included the complete replacement of two major boiler components: the high temperature reheater and the economizer, at a cost of approximately \$30 million. The project as a whole cost approximately \$65 million and was unprecedented in the 40-year history of the Monroe Power Plant.

EPA then alleges more generally in its First and Second Claims for Relief:

On or about March 13, 2010, Defendants commenced construction of a major modification, as defined by the Act and the Michigan SIP, that included the overhaul work described above. This major modification included one or more physical changes or changes in the method of operation at Monroe Unit 2. This major modification resulted in significant net emissions increases, as defined by the relevant PSD regulations, of one or more of the following pollutants: NO_x and SO₂.

(Compl. ¶¶ 50, 55.) So like the NOV, the Complaint is focused specifically on the three Tube Projects.

IV. EPA’s Preliminary Injunction Briefing and Supporting Declarations Focus Only on the Tube Projects.

The briefing and expert declarations that EPA submitted in support of its motion for a

preliminary injunction also focused on the three Tube Projects. In purporting to apply the “WEPCO” factors for assessing whether these projects were routine maintenance, repair or replacement,” EPA focused exclusively on the Tube Projects:

- With respect to the “nature and extent” of the work, EPA noted that “[b]oth the *economizer and pendant reheater replacements* were considered major capital projects by [Detroit Edison], and required the approval of senior company officials”;
- With respect to “purpose,” EPA explained: “After nearly 40 years of operation, *the pendant reheater and economizer* had reached the end of their useful life. . . . The purpose of the project was to replace *those components* with upgraded designs and materials in order to avoid forced outages and thus improve the ability of the plant to generate electricity.”
- With respect to “frequency,” EPA again pointed to two of the three tube projects: “[I]t is the first time [Detroit Edison] has completely replaced the economizer or pendant reheater at Monroe Unit 2. . . . [I]t is the first time that [Detroit Edison] has performed work on *both the economizer and the reheater* at the same time.”
- And with respect to “cost,” EPA again emphasized the Tube Projects: “The total cost of the March to June 2010 Outage work at Monroe Unit 2 was approximately \$65 million, of which approximately \$30 million was spent on replacing the *pendant reheater and the economizer*. *The reheater and economizer replacements were capital improvement projects*. . . . Such large capital expenditures are not routine.

See Mem. in Support of Pl.’s Mtn. for Prelim. Injunction (Docket Entry No. 8) at 19-20.

(emphases added). EPA took the same approach with respect to its arguments relating to “emissions increase.” It explained that “the company’s project justification documents stated that replacing the economizer and pendant reheater was necessary to eliminate forced outages and improve unit availability. . . . In the future, [Monroe Unit 2] will run during the additional, available hours recovered by replacing the worn out economizer and pendant reheater.” *Id.* at 23-24. In contrast to its emphasis on the economizer and pendant reheater projects, EPA *never* mentions any of the other projects performed during the Outage.

The expert declarations that EPA used to support its motion for preliminary injunction also focused exclusively on the Tube Projects. Myron Adams, in supporting his opinion that “major refurbishment on a sizeable generating unit component or subsystem . . . can be expected to improve the availability of that component or subsystem,” specifically identifies the economizer and the reheater. *See* Decl. of Myron Adams (Docket Entry No. 8-21) at ¶ 9. And in his reply declaration, he narrowed his focus yet further: “My focus in this analysis is on the replacement and upgrade of the economizer, one of several projects [Detroit Edison] performed during the outage.” *See* Reply Decl. of Myron Adams (Docket Entry No. 58-12) at ¶ 4. Alan Hekking likewise described the Tube Projects as projects that are not “routine.” *See* Decl. of Alan Michael Hekking (Docket Entry No. 8-17) at ¶¶ 38-41. And Robert Koppe and Ranajit Sahu, EPA’s experts on emissions, focused only on the economizer and reheater when performing their emissions increase calculations. As Dr. Sahu explained:

I looked at the component-specific GADS availability loss data (in megawatt-hours) for each of the 24-month baseline periods prior to the modification. This data was gathered by Robert Koppe and is explained in his declaration. *To simplify matters, we only considered GADS availability loss data for the economizer and pendant reheater.*

Declaration of Ranajit Sahu (Docket Entry No. 8-13) at ¶ 9 (emphasis added).

V. EPA Has Represented to the Court That Its Case Is Limited to the Tube Projects.

Consistent with its NOV, its Complaint, its briefing in support of its preliminary injunction motion, and its expert declarations, EPA has repeatedly represented to the Court that this case is about the three Tube Projects. At the hearing on January 19, 2011, when the Court was evaluating how long it would take the parties to prepare the case for a trial on liability, EPA made clear that the case would be limited in scope to the projects that were the subject of the briefing on the preliminary injunction motion. (Ex. 3, Jan. 19, 2011 Hr. Tr. at 142-145.) EPA

claimed it would be a case that “we can [try] in another 90 days as the Court has suggested.” (*Id.* at 144.) And EPA confirmed that it would focus on the three Tube Projects in its portion of the parties’ Rule 26(f) report under the heading, “Description of the Claims”:

Plaintiff alleges that the replacement of the economizer, high temperature reheater, and waterwalls at Monroe Unit 2 should have been expected to result in a significant net emissions increase in sulfur dioxide and oxides of nitrogen, and were therefore a major modification (or major modifications) under NSR.

Rule 26(f) Report (Docket Entry No. 40) at 2-3.

VI. Discovery Commences, and EPA Changes Its Tune.

The parties are now in the early stages of discovery as part of an aggressive pre-trial schedule for a case of this magnitude, and EPA has made clear that it intends to expand its case beyond the Tube Projects that are specifically identified in its NOV. In its first round of discovery requests, EPA purported to define the “Project” that it will contend qualifies as a “modification” under the NSR regulations as the entire collection of projects performed during the 2010 Outage. (Ex. 4a, Plaintiff United States’ First Set of Interrogatories to Defendants DTE Energy and Detroit Edison at 8; Ex. 4b, Plaintiff United States’ First Set of Document Requests to Defendants DTE Energy and Detroit Edison at 8.) According to EPA, the three Tube Projects are not “projects” in and of themselves, but rather are elements of the larger project. (*Id.* at 6-7.) EPA thus seeks discovery not only as to the Tube Projects, but also as to every other piece of work conducted at Monroe 2 during the Outage. (*See, e.g., Id.* (Interrogatories 2, 5-8, 12-13, 15-16, 18).) According to EPA:

All of this work was performed as part of the overhaul project constructed by Defendants during the Spring 2010 outage at Monroe Unit 2. *It is not for Defendants to define what aspect of the work done during the outage count for [NSR] purposes.*

(Ex. 5, March 8, 2010 Ltr. from Tom Benson (emphasis added)).²

On this point, Detroit Edison agrees. It is not Detroit Edison's responsibility to define the scope of this case. Under Section 113(a), that was EPA's job, and it chose to limit this case to the three Tube Projects. The scope of discovery should be similarly confined.

ARGUMENT

I. The Scope of EPA's Case Is Limited by the Scope of the NOV.

A. The Court's Jurisdiction Is Limited to the Projects Specified in the NOV.

This Court's subject matter jurisdiction over EPA's claims is limited by the content of the notice of violation required by 42 U.S.C. § 7413(b). The scope of EPA's complaint is likewise limited. Because the EPA failed to provide pre-suit notice to Detroit Edison regarding the Non-Tube Projects, those claims are not a part of the case.

The basic legal standards governing the pre-suit notice provisions of environmental laws are well established. The general rule is that compliance with a notice provision is "a mandatory, not optional, condition precedent for suit," and any claim brought without the proper notice "must be dismissed." *Hallstrom v. Tillamook County*, 493 U.S. 20, 26, 31 (1989) (applying the 60-day notice requirement for citizen suits under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972).

The applicable notice requirement for this case is found in section 113 of the Act. *See* 42 U.S.C. § 7413(a)(1). Section 113(a)(1) requires EPA to provide notification to any person al-

² At the same time that EPA is putting Detroit Edison to the burden of providing discovery as to projects beyond the Tube Projects identified in the NOV, EPA is also demanding that Detroit Edison do the work that EPA is required to do in responding to Detroit Edison's discovery requests. For example, EPA recently produced 4.5 million pages of documents that supposedly relate to other NSR cases without appearing to conduct any meaningful review of them to determine whether they are relevant to the issues in this case or responsive to Detroit Edison's discovery requests. In further violation of Rule 34 of the Federal Rules of Civil Procedure, EPA also failed to "organize and label [the documents] to correspond to the categories in the request." Fed. R. Civ. P. 34; *see also* Ex. 6, Mar. 18, 2011, Ltr. from Brent Rosser to Tom Benson.

leged to be in violation of any requirement or prohibition of an applicable SIP. 42 U.S.C. § 7413(a)(1) (“Whenever . . . the Administrator finds that any person has violated . . . an applicable implementation plan . . . the Administrator shall notify the person and the State in which the plan applies of such finding.”) (emphasis added). That same section further provides that “[a]t any time *after the expiration of 30 days following the date on which such notice of a violation is issued*, the Administrator may . . . bring a civil action in accordance with subsection (b) of this section.” *Id.* (emphasis added). Following up on that notice requirement, subsection (b) states:

(b) Civil judicial enforcement

The Administrator shall, as appropriate, in the case of any person that is the owner or operator of an affected source, a major emitting facility, or a major stationary source, and may, in the case of any other person, commence a civil action . . . in any of the following instances:

(1) Whenever such person has violated, or is in violation of, any requirement or prohibition of an applicable implementation plan or permit. Such an action shall be commenced (A) during any period of federally assumed enforcement, or (B) *more than 30 days following the date of the Administrator’s notification under subsection (a)(1) of this section that such person has violated, or is in violation of, such requirement or prohibition.*

Id. § 7413(b)(1) (emphasis added); *see also Sierra Club v. Johnson*, 541 F.3d 1257, 1262 (11th Cir. 2008) (“Thirty days after the issuance of a violation notice, the statute authorizes the EPA to bring a civil action seeking injunctive relief and the imposition of civil fines. [42 U.S.C.] § 7413(a)(1)(C)), (b).”).

The statutory authority for bringing a lawsuit, and this Court’s jurisdiction to hear it, are thus premised on EPA’s providing the required pre-suit notice. This requirement is jurisdictional. *See United States v. LTV Steel Co.*, 116 F. Supp. 2d 624, 632 (W.D. Pa. 2000) (“A jurisdictional prerequisite to the U.S. EPA’s filing suit, however, is that it comply with the CAA’s notice requirement at 42 U.S.C. Section 7413(a)(1).”); *United States v. AM General Corp.*, 808

F. Supp. 1353, 1362 (N.D. Ind. 1992) (“Section 113 clearly requires that the EPA must serve AM General with a NOV before it may proceed with judicial enforcement proceedings. § 113(a)(1). The requirement is jurisdictional[.]”); *United States v. Ford Motor Co.*, 736 F. Supp. 1539, 1550 (W.D. Mo. 1990) (holding that the notice requirement in 42 U.S.C. § 7413(a) “is jurisdictional”). Accordingly, EPA is only authorized to bring civil actions under 42 U.S.C. § 7413(b) based on the “specific violation[s] alleged in the NOV.” *AM General Corp.*, 808 F. Supp. at 1362; *see also United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 2d 1141, 1155 (D. Colo. 1988) (“EPA is empowered to bring . . . a civil suit only on the basis of the specific violation alleged in the NOV”) (“*Louisiana-Pacific II*”); *United States v. Brotech Corp.*, No. Civ. A. 00-2428, 2000 WL 1368023, at *2 (E.D. Pa. Sept. 19, 2000).

The scope of EPA’s NOV thus defines the permissible scope of any subsequent complaint. EPA cannot “expand [the suit] beyond the specific violations alleged in th[e] letter.” *Louisiana-Pacific II*, 682 F. Supp. 1155. “As a result, ***not every violation of the PSD provisions is actionable***, but only those where the alleged offender is notified of the violation” *Id.* (emphasis added). “[T]o allow the EPA to notify the alleged offender of one violation, and then bring a civil action on the basis [of] another violation (different than that alleged in the notice) . . . would completely frustrate the notice requirement created by Congress.” Therefore, failure to abide by the presuit notice requirements set forth in 42 U.S.C. § 7413(a) and (b) warrants dismissal for lack of subject matter jurisdiction. *See United States v. Pan American Grain Mfg. Co.*, 29 F. Supp. 2d 53, 56 (D.P.R. 1998) (stating that the “Court will lack jurisdiction” if EPA fails to comply with CAA notice requirements); *Ford Motor Co.*, 736 F. Supp. at 1550.

B. The NOV Identified the Tube Projects Only.

The irreducible minimum in terms of specificity in a “notice of violation” is that the notice actually identify the precise activity that constitutes a violation of the Act. Here, EPA’s al-

leged violation is that Detroit Edison has not complied with the NSR rules³ that require that an operator obtain a preconstruction permit whenever a new source is to be built or when an existing major stationary source is to undertake a project that constitutes a “major modification” to that source. *See, e.g.*, MICH. ADMIN. CODE R. 336.2802. As relevant here, the definition of “major modification” tracks the statutory language in requiring that, for a proposed activity to constitute a “modification,” there must be (i) a “physical or operational change” that (ii) “results in” (*i.e.*, causes) (iii) a “significant emissions increase.” *Id.* 336.2801(aa)(i); 40 C.F.R. pt. 51, App. S. So to state a violation in its NOV, EPA was required to identify the specific “physical or operational change” that will cause an emissions increase.

EPA here only identified the Tube Projects in its NOV as the projects that constituted “major modifications” undertaken in violation of the Michigan SIP. (Ex. 1, NOV at 4 ¶¶ 20-21.) It specifically enumerated these replacement projects in Paragraph 20 and explained in Paragraph 21 that these “replacement projects . . . are major modifications under the Clean Air Act and the Michigan implementing regulations” (*Id.*) So the Court only has jurisdiction over claims that these specific projects individually constitute major modifications. Conversely, the Court lacks jurisdiction to entertain any claim that any Non-Tube Project — whether considered independently or in combination with other projects — constitutes a major modification undertaken in violation of Michigan’s SIP. *See Pan American Grain*, 29 F. Supp. 2d at 56.

EPA now contends that the NOV was broad enough to encompass the Non-Tube Pro-

³ Two different NSR programs are at issue here. The first is the Prevention of Significant Deterioration (“PSD”) program, and the second is the Non-Attainment New Source Review (“NNSR”) program. EPA has approved Michigan’s SIP with respect to the PSD regulations, but not as to the relevant NNSR regulations. Accordingly, the Michigan SIP contains the controlling PSD regulations at issue in this case, while the federal regulations control as to NNSR. Regardless, both sets of the regulations are the same as they pertain to NSR applicability issues, and Detroit Edison refers to them collectively as the “NSR rules” in this Memorandum.

jects. After Detroit Edison objected to discovery requests targeting the Non-Tube Projects, EPA explained its new position: “We note that Defendants are incorrect in alleging that the notice of violation was limited to three of the replacements performed during the project. The NOV refers to a major modification that includes but is not limited to the three boiler component replacements for which Defendants would allow discovery.” (Ex. 5, Benson Letter at 2 n.2. (citing NOV ¶¶ 20, 23.) EPA specifically references Paragraph 20 of the NOV, where EPA states that “[t]he construction activities” undertaken during the Outage “include, but are not limited to . . . replacement of economizer tubes; replacement of reheat pendants; and replacement of waterwall tubes and burner cells.” The exact theory is unclear, but EPA appears to argue that either (a) the generic reference to “construction activities” performed during the Outage is sufficient to satisfy the notice requirement as to any individual Non-Tube Project; or (b) that the entire Outage should be treated as a single “project” for purposes of NSR analysis, and the notice adequately identifies the Outage. Both theories should be rejected.

1. The Notice Is Insufficient as to Any Specific Non-Tube Project.

EPA’s generic reference to “construction activities” performed during the Outage does not satisfy the notice requirement as to any individual Non-Tube Project. As EPA’s expert witness Alan Hekking has explained, operators like Detroit Edison will perform a host of indisputably routine maintenance activities during a planned outage:

- Cleaning of boiler and related ductwork to facilitate maintenance access and inspections;
- Inspection of the furnace and gas path;
- Inspection including non-destructive examination of known trouble areas;
- Individual tube repair/replacement;
- Inspection of tube shields and high erosion areas;

- Inspection, repair and replacement of refractory in the slag necks and troughs;
- Inspection and repair of ductwork and expansion joints;
- Cleaning and inspection of boiler penthouses;
- Water blasting, inspection, stud replacement and new refractory (cyclone fired boilers);
- Inspection and repair of boiler casings, doors and inspection ports;
- Inspection and repair of gas path deflection baffles and flow distributors;
- Inspection and repair of all dampers (air and gas);
- Remove, disassemble, inspect and repair ignitors;
- Cleaning, inspection and repair of external steam header vestibules;
- Pressure test of water and steam tubing components; and
- Chemical cleaning of water-side tubing to remove internal deposits.

Hekking Decl. ¶ 24. Detroit Edison's Outage was no different. Even within the category of "capital projects," Detroit Edison conducted a number of other projects that are routine maintenance, repair and replacement, including the replacement of battery chargers, upgrades to circuit breakers, asbestos removal and lead abatement. (Ex. 2)

If EPA's general reference to "work performed during an outage" is sufficient to meet its notice requirement as to any of the dozens of projects performed during the outage, then the requirement is illusory. EPA could be alleging that one of these projects constitutes a violation, or that they all do. Detroit Edison and the Michigan regulators are left to guess.

Courts have rejected precisely the tactic that EPA employs here. *United States v. East Kentucky Power Cooperative*, a NSR enforcement case like this one, is instructive. *See United States v. E. Ky. Power Cooperative*, No. 5:04-cv-00034 (E.D. Ky. June 17, 2005) (order granting motion for protective order) (Ex. 7). There, as here, EPA specifically referenced four projects in

its NOV that it contended were undertaken in violation of the NSR rules. There, as here, EPA alleged in its complaint that the work performed by the Defendant constituted “one or more major modifications.” *Id.* at 6. And there, as here, EPA sought to expand discovery beyond the projects specifically identified in the notice. In granting EKPC’s motion for protective order, the Court rejected EPA’s argument that the its general reference to “one or more major modifications” provided sufficient notice:

Based on well-settled law that the EPA may only bring a civil action against an alleged violator of the Act on the basis of the charged violation(s) contained in a NOV previously issued to that alleged violator, the [Court] concludes that plaintiff lacks jurisdiction to assert any claims against EKPC that were not contained in the NOVs to EKPC.

...

Plaintiff’s statement that EKPC undertook “one or more major modifications” is too broad and too vague to comply with the requirements of notice pleading. In a nutshell, plaintiff is not free simply to recharacterize its complaint as being “broad” enough to permit it to obtain discovery from EKPC on projects not identified in the complaint.

Id. at 5-6.

EPA’s catch-all reference to “construction activities” that “include, but are not limited to” the Tube Projects is just as deficient as the catch-all language EPA used in *EKPC*. If that language is insufficient under liberal notice pleading standards, it is certainly insufficient under the more exacting standards that govern Section 113(a) NOVs.

2. The Collection of Work Performed During the Outage Cannot Be Considered a Single Project.

To the extent EPA is contending the NOV is sufficient because it identified the entire collection of work performed at Monroe 2 during the Outage as the “modification” that triggered NSR, EPA’s theory is at odds with the language of the NSR rules. The definition of “modification” makes clear that the focus cannot be so broad as to encompass all of the work

performed during a given outage. Specifically, the NSR rules provide that a “[p]hysical change ... shall not include ... [r]outine maintenance, repair, and replacement [(RMRR)].” MICH. ADMIN. CODE R. 336.2801(aa)(iii). And in deciding what constitutes RMRR, EPA itself has treated discrete components and systems as the units of measure when evaluating whether a project is routine. For example, in its “WEPCo Rule,” EPA made clear the focus of the “routine” determination should be whether the repair or replacement of a specific type of equipment is routine in the industry: “EPA today is clarifying that the determination of whether the repair or replacement of a particular item of equipment is “routine” under the NSR regulations, while made on a case-by-case basis, must be based on the evaluation of whether *that type of equipment* has been repaired or replaced by sources within the relevant industrial category.” 57 Fed. Reg. 32,314, 32,326 (July 21, 1992) (emphasis added). This regulatory pronouncement of EPA in the *Federal Register* has never been rescinded, withdrawn, or revoked.

So EPA itself, in construing the Clean Air Act and promulgating the regulations on which Michigan’s SIP is based, has concluded that the unit of the analysis when considering what constitutes a “major modification” is the discrete type of equipment being repaired or replaced. The definition of “major modification” does not work if the unit of analysis is the aggregation of a series of discrete projects. For this reason, with the exception of massive “Life Extension” projects,⁴ courts typically have eschewed treating a collection of replacement projects as a single “physical change” for purposes of NSR analysis. For example, in *National Parks Conservation Association, Inc. v. Tennessee Valley Authority*, No. 3:01-CV-071, 2010 WL 1291335 (E.D. Tenn. Mar. 31, 2010), the court confronted a case very similar to EPA’s case here and treated

⁴ See, e.g., *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 905 (7th Cir. 1990) (describing “extensive renovations” intended to extend the life of units placed into operation between 1935 and 1950); *United States v. Cinergy Corp.*, 495 F. Supp. 2d 909, 915-17 (S.D. Ind. 2007) (describing the “‘full’ or ‘complete’ life extension” projects at the Beckjord units).

discrete projects as the unit of measure when evaluating the “physical change” element of the definition of major modification. As is the case here, the Plaintiff’s case focused on separate projects performed during the same outage. TVA had replaced two boiler components on a unit — the economizer and the superheater — and undertook numerous other projects during that outage. *NPCA*, 2010 WL 1291335 at *13. Like EPA here, the plaintiff identified these two projects in its notice of intent to sue.⁵ (Ex. 8, *NPCA* 2000 NOI at 4-5.) The court did not aggregate all of that work as one “project” when analyzing the work under the NSR rules. It instead went “project-by-project,” first analyzing the economizer replacement and then analyzing the superheater replacement. *Id.* at *24 -*31. And the Court concluded that each project qualified as RMRR.

Treating an aggregation of independent projects as the unit of analysis also creates odd results that effectively nullify the RMRR exclusion to the definition of physical change. For example, assume that an operator like Detroit Edison schedules during the same outage the replacement of two unrelated pieces of equipment — Component A and Component B. The replacement of Component A arguably causes an increase in emissions, but it is unquestionably routine. So considered alone, the replacement of Component A is not a “major modification.” MICH. ADMIN. CODE R. 336.2801(aa)(i). The replacement of Component B, in contrast, does not cause an increase in emissions, but it is indisputably non-routine. So as with the replacement Component A, the replacement of Component B is not a “major modification.” In other words, when the projects are considered separately as required by the rules, they do not trigger NSR. But if EPA can lump the two projects together and characterize the two replacements as a single

⁵ *NPCA*’s notice of intent to sue is nearly identical in this respect to an NOV that EPA had previously served on TVA. (Ex. 9, TVA NOV at 12-13.) EPA ultimately elected not to file suit, instead issuing an administrative order to TVA. *See TVA v. Whitman*, 336 F.3d 1236 (11th Cir. 2003) (ruling the order to TVA unlawful).

“physical change,” it can manufacture a violation where none otherwise exists. Combined, the aggregated work is not routine, because it is never routine to replace Component B, and it causes an increase in emissions due to the effect of the replacement of Component A. Thus, the operator’s liability is solely a function of the happenstance that these two projects were performed during the same outage.

EPA itself has recognized the perverse results that can obtain when this type of aggregation is allowed. In 2006, EPA announced that it would promulgate rules regarding aggregation to codify long-standing informal guidance. 71 Fed. Reg. 54,235, 54,244-54,248 (Sept. 14, 2006). In early 2009, EPA promulgated rules that remain under review, but explained in its preamble to those rules that its longstanding guidance dictates that projects should be aggregated when they are “substantially related,” and that substantial relationship is measured by technical or economic interdependence. 74 Fed. Reg. 2,376, 2,378 (Jan. 15, 2009). EPA further explained that the mere fact that two projects are scheduled during the same outage is not evidence of a substantial relationship:

Within certain industries, it may be common practice for certain types of activities to be done separately (though not necessarily at separate times). A company’s decision to do a series of activities at the same time — e.g., during a conventional scheduled outage, “turnaround” or “annual shutdown” — should not be viewed as evidence of their technical or economic relatedness. In fact, absent an evaluation of the technical or economic relationship among the activities, the only presumption that should be gleaned from the practice of utilities, refineries, or other types of industry to do many activities during normally scheduled outages is that it is efficient and cost-effective to undertake multiple activities at the same time. Some of these activities will, in fact, be unrelated, but are done simultaneously simply because it is easier to make these changes at a time when the source is not operating. These activities should not be automatically aggregated.

Id. at 2,379.

Consistent with this long line of regulatory guidance and decisional law, EPA could not

state a violation of NSR by aggregating a series of unrelated projects performed in a single outage and calling that aggregation of work a “major modification.” Instead, EPA was required to identify the discrete projects that it contends constitute major modifications. To the extent it believed that individual items of work performed during the outage should be aggregated, EPA was required to say so, identify those items in its NOV, and show (or at least allege) a substantial relationship between the projects.

Against this legal backdrop, EPA’s NOV can only be read to identify the three Tube Projects with the specificity that Section 113 requires. Those are the only discrete projects identified in the Notice, and there is no allegation that these projects are “substantially related” to any other work performed during the Outage. If EPA intended to state that other projects, either alone or in combination, constituted violations, Detroit Edison and the Michigan regulators are left to guess what projects are included and what the relationship is between them. And in an outage involving dozens of individual work items, where the possible combinations are staggering, EPA’s “notice” is no notice at all with respect to these potential theories of liability.

The Court cannot exercise jurisdiction over any claim that any of the Non-Tube Projects, either alone or in combination with other projects, constitute violations of the NSR rules. So the Complaint cannot be construed to reach them.⁶

II. The Court Should Enter a Protective Order Limiting Discovery in the Case to the Three Tube Projects Listed in the NOV.

Because the Non-Tube Projects are not properly a part of the case, EPA should not be allowed to take substantial and intrusive discovery as to those projects, especially in light of the expedited schedule of this case and EPA’s representations to the Court regarding the scope of

⁶ Should the Court conclude that under these circumstances the Complaint can be read to encompass these projects, EPA’s claims should be dismissed for lack of subject matter jurisdiction to the extent they exceed the scope defined by the NOV.

discovery.

Federal Rule 26(c) authorizes the Court to order that certain matters not be inquired into, or that the scope of discovery be limited to certain matters. Fed. R. Civ. P. 26(c)(4). A protective order that limits the scope of discovery requires a showing of good cause.

The Federal Rules of Civil Procedure were revised in December 2000 to confine discovery to matters “relevant to the claim or defense of any party[.]” Fed. R. Civ. P. 26(b)(1). This language was added to focus discovery on the specific issues before the courts, rather than tangential matters of questionable relevance. As the Advisory Committee explained at the time:

The Committee has heard that in some instances, *particularly in cases involving large quantities of discovery*, parties seek to justify discovery requests that sweep far beyond the claims and defenses of the parties on the ground that they nevertheless have a bearing on the “subject matter” involved in the action. . . . The Committee intends that the parties and the court focus on the *actual claims and defenses involved in the action*.

Fed. R. Civ. P. 26(b)(1) 2000 Amendment, Advisory Committee’s Note (emphasis added).

Protection is warranted here because EPA’s discovery seeks documents and information on work that is not related in any way to the projects at issue. *Green v. Nevers*, 196 F.3d 627, 632 (6th Cir. 1999) (“[D]istrict court does not abuse its discretion in denying discovery when the discovery requested would be irrelevant to the underlying issue to be decided.”). Courts have consistently rejected efforts by EPA in similar cases to expand its case beyond the scope mandated by its NOV. *See, e.g., EKPC* at 5-6; *United States v. Cinergy Corp.*, No. 1:99-cv-1693-LJM/VSS, slip op. at 4 (S.D. Ind. March 21, 2005) (Ex. 10).

EPA cannot justify its expansion of the case based on the vague expansiveness of its allegations in its Complaint and NOV. As explained above, Section 113(a) dictates that EPA’s case be constrained by the content of its NOV, and its NOV here is limited to the three Tube Projects. And EPA cannot now use discovery as “a hunting license to discover whether in fact a

viable claim may be alleged. The discovery rules are designed to support a *properly pleaded cause of action and to prepare defenses to charges made* not to discover whether a claim exists.” *American Communications Ass’n. Local 10, I.B.T. v. Retirement Plan for Employees of RCA Corp.*, 488 F. Supp. 479, 484 (S.D.N.Y. 1980) (emphasis added); *see also McLaughlin v. Copeland*, 455 F. Supp. 749, 753 (D. Del. 1978) (“[W]hile a plaintiff is entitled to a full opportunity to adduce evidence in support of the cognizable claims set out in his complaint, he is not entitled to discovery for the purpose of determining whether or not there may be a factual basis for a claim [it] has not made.”).

CONCLUSION

For the foregoing reasons, the Court should limit the scope of the case to conform to EPA’s NOV. The Court also should enter a protective order that limits the scope of the discovery to the scope of the case as defined by EPA’s NOV.

Respectfully submitted, this 23rd day of March 2011.

HUNTON & WILLIAMS LLP

Matthew J. Lund (P48632)
Pepper Hamilton LLP
100 Renaissance Center, 36th Floor
Detroit, Michigan 48243
lundm@pepperlaw.com
(313) 393-7370

Michael J. Solo (P57092)
Office of the General Counsel
DTE Energy
One Energy Plaza
Detroit, Michigan
solom@dteenergy.com
(313) 235-9512

/s/ F. William Brownell
F. William Brownell
bbrownell@hunton.com
Mark B. Bierbower
mbierbower@hunton.com
Makram B. Jaber
mjaber@hunton.com
Brent A. Rosser
brosser@hunton.com
Hunton & Williams LLP
1900 K Street, N.W.
Washington, D.C. 20006-1109
(202) 955-1500
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2011, the foregoing **DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PROTECTIVE ORDER** was electronically filed with the Clerk of Court using the ECF system, which will automatically send notification the following attorneys of record:

Ellen E. Christensen
U.S. Attorney's Office
211 W. Fort Street
Suite 2001
Detroit, MI 48226
313-226-9100
Email: ellen.christensen@usdoj.gov

James A. Lofton
Thomas Benson
Justin A. Savage
Kristin M. Furrie
U.S. Department of Justice
Environmental and Natural Resource Div.
Ben Franklin Station
P.O. Box 7611
Washington, DC 20044
202-514-5261
Email: thomas.benson@usdoj.gov
justin.savage@usdoj.gov
kristin.furrie@usdoj.gov
jim.lofton@usdoj.gov

Holly Bressett
Sierra Club Environmental Law Program
85 Second St., 2nd Floor
San Francisco, CA 94105
Phone: (415) 977-5646
Email: Holly.Bressett@sierraclub.org

Andrea S. Issod
Sierra Club
85 2nd Street, 2nd Floor
San Francisco, CA 94105
415-977-5544
Email: andrea.issod@sierraclub.org

/s/ F. William Brownell

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

UNITED STATES OF AMERICA,

Plaintiff,

And

NATURAL RESOURCES DEFENSE
COUNCIL, INC. AND SIERRA CLUB,

Intervenor-Plaintiffs,

v.

DTE ENERGY COMPANY AND
DETROIT EDISON COMPANY,

Defendants.

Civil Action No.
2:10-cv-13101-BAF-RSW

Judge Bernard A. Friedman

Magistrate Judge R. Steven Whalen

**INDEX OF EXHIBITS TO DEFENDANTS' MEMORANDUM
OF LAW IN SUPPORT OF THEIR MOTION FOR PROTECTIVE ORDER**

<u>Exhibit</u>	<u>Description</u>
1	Notice of Violation (June 4, 2010)
2	Monroe Power Plant Unit #2 2010 Periodic Outage Preparation Status Report
3	Excerpts of January 19, 2011 Hearing Transcript
4(a)	Plaintiff United States' First Set of Interrogatories to Defendants DTE Energy and Detroit Edison (January 28, 2011)
4(b)	Plaintiff United States' First Set of Document Requests to Defendants DTE Energy and Detroit Edison (January 28, 2011)
5	Letter from Thomas Benson to Mark Bierbower (March 8, 2011)
6	Letter from Brent Rosser to Thomas Benson (March 18, 2011)
7	Order, <i>United States v. E. Ky. Power Cooperative</i> , No. 5:04-cv-00034 (E.D. Ky. December 1, 2005)

- 8 Notice of Intent to Sue for Violations of the Clean Air Act at the Allen, Bull Run, Cumberland, Kingston, John Sevier, Paradise, Shawnee, Colbert, Widows Creek, and Johnsonville Fossil Plants (October 30, 2000)
- 9 Notice of Violation - Tennessee Valley Authority (March 9, 2000)
- 10 Order, *United States v. Cinergy Corp.*, No. 1:99-cv-1693-LJM/VSS, (S.D. Ind. June 17, 2005)
- 11 Glossary of Acronyms Referenced in Defendants' Memorandum of Law in Support of Motion for Protective Order

EXHIBIT 1
TO DEFENDANTS'
MEMORANDUM OF LAW
IN SUPPORT OF MOTION
FOR PROTECTIVE
ORDER

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:

**DTE Energy Company
and
The Detroit Edison Company**

Detroit, Michigan

)
)
)
) **Proceedings Pursuant to**
) **Section 113(a)(1) and (a)(3) of the**
) **Clean Air Act,**
) **42 U.S.C. §7413(a)(1) and (a)(3)**
)
) **EPA-HQ-2010-MI-1**
)
)
)

NOTICE AND FINDING OF VIOLATION

The U.S. Environmental Protection Agency (EPA) is issuing this Notice and Finding of Violation (Notice) under Section 113(a)(1) and 113(a)(3) of the Clean Air Act, 42 U.S.C. § 7413(a)(1) and § 7413(a)(3). The authority to issue this Notice has been delegated to the Director, Air Enforcement Division, Office of Enforcement and Compliance Assurance, U.S. EPA. EPA finds that DTE Energy and the Detroit Edison Company (collectively herein, DTE) are violating the Clean Air Act (Act), 42 U.S.C. §§ 7401 *et seq.*, at its Monroe power plant, as follows:

STATUTORY AND REGULATORY BACKGROUND

Prevention of Significant Deterioration

1. When the Act was passed in 1970, Congress exempted existing facilities, including the coal-fired power plants that are the subject of this Notice, from many of its requirements. However, Congress also made it quite clear that this exemption would not last forever. As the United States Court of Appeals for the D.C. Circuit explained in *Alabama Power v. Costle*, 636 F.2d 323, 400 (D.C. Cir. 1979), “[t]he statutory scheme intends to ‘grandfather’ existing industries; but...this is not to constitute a perpetual immunity from all standards under the PSD program.” Rather, the Act requires grandfathered facilities to install modern pollution control devices whenever the unit is proposed to be modified in such a way that its emissions may increase.

2. On June 19, 1978, EPA promulgated regulations pursuant to Part C of Title I of the Act. 43 *Fed. Reg.* 26403 (June 19, 1978).

3. The Prevention of Significant Deterioration (PSD) provisions of Part C of Title I of the Act establish specific provisions applicable to the construction and modification of sources located in areas designated as either attainment or unclassifiable for purposes of meeting the NAAQS. *See* 42 U.S.C. §§ 7470-7492. These statutory provisions and their implementing regulations at 40 C.F.R.

§ 52.21, collectively known as the PSD program, provide that if a major stationary source located in an attainment area is planning to make a major modification, then that source must obtain a PSD permit before beginning actual construction. *See* 40 C.F.R. § 52.21(i). To obtain this permit, the source must, among other things, undergo a technology review and apply Best Available Control Technology (BACT); perform a source impact analysis; perform an air quality analysis and modeling; submit appropriate information; and conduct additional impact analyses as required.

4. On September 16, 2008, EPA conditionally approved the State of Michigan's PSD program under 40 C.F.R. § 52.21, 73 Fed. Reg. 53366. On March 25, 2010, EPA fully approved Michigan's PSD SIP provisions, 75 Fed. Reg. 14,352. The Michigan PSD SIP provisions are codified at Michigan Admin. Code R. 336.2801 to 336.2830.

5. The PSD regulations appearing at Michigan Admin. Code R. 336.2801 to 336.2830 were incorporated into and part of the Michigan SIP at the time of the major modification at issue in this case, and they have been approved by EPA and are federally enforceable requirements. All citations to the PSD regulations herein refer to the provisions of Michigan SIP as applicable at the time of the Current Construction Activities described herein.

6. Michigan Admin. Code R. 336.2802(3) provides that no new major stationary source or major modification to which R 336.2810 to R 336.2818 apply shall begin actual construction without a permit to install issued under R 336.1201(1)(a) that states that the major stationary source or major modification will meet those requirements.

7. Michigan Admin. Code R. 336.2802(4) provides that this part applies to the construction of new major sources and major modifications to existing major sources in the following manner: (a) . . . a project is a major modification for a regulated new source pollutant if it causes both of the following types of emission increases: (i) significant emissions increase and (ii) significant net emission increase.

Non-attainment New Source Review

8. Part D of Title I of the Act, 42 U.S.C. §§ 7501-7515, sets forth provisions for New Source Review ("NSR") requirements for areas designated as being in non-attainment with the NAAQS standards. These provisions are referred to herein as the "Non-attainment NSR" program. The Non-attainment NSR program is intended to reduce emissions of air pollutants in areas that have not attained NAAQS so that the areas make progress towards meeting the NAAQS. Prior to the effective date of the 1990 Clean Air Act Amendments, P. Law 101-549, effective November 15, 1990, the Non-attainment NSR provisions were set forth at 42 U.S.C. §§ 7501-7508.

9. Under Section 172(c)(5) of the Non-attainment NSR provisions of the Act, 42 U.S.C. § 7502(c)(5), each state is required to adopt Non-attainment NSR SIP rules that include provisions to require permits that conform to the requirements of Section 173 of the Act, 42 U.S.C. § 7503, for the construction and operation of modified major stationary sources within non-attainment areas. Section 173 of the Act, in turn, sets forth a series of minimum requirements for the issuance of permits for major modifications to major stationary sources

within non-attainment areas. 42 U.S.C. § 7503.

10. Section 173(a) of the Act, 42 U.S.C. 7503(a), provides that construction and operating permits may be issued if, *inter alia*: “(a) sufficient offsetting emission reductions have been obtained to reduce existing emissions to the point where reasonable further progress towards meeting the national ambient air quality standards is maintained; and (b) the pollution controls to be employed will reduce emissions to the lowest achievable emission rate.”

11. Under 40 C.F.R. Part 51, Appendix S, Emission Offset Interpretative Ruling, no person may undertake a major modification of an existing major stationary source in a non-attainment area without first obtaining a Non-attainment NSR permit.

12. Under Appendix S, a “major stationary source” of NO_x is one that emits or has the potential to emit 100 tons per year or more, and a “significant” net emissions increase of NO_x is one that results in increased emissions of 40 tons per year or more of this pollutant.

13. “Major modification” is defined by 40 C.F.R. Part 51, Appendix S, as “any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.”

FACTUAL BACKGROUND

14. DTE is a “person,” as that term is defined in Section 302(e) of the Act, 42 U.S.C. § 7602(e).

15. From April 5, 2005, to the present, the Monroe power plant has been located in an area classified as non-attainment for fine particulates (PM_{2.5}).

16. At all times relevant to the NOV, the Monroe power plant has been located in an area that has been classified as attainment for SO₂ and ozone.

17. The Monroe power plant is a fossil fuel-fired electric utility steam generating station located in Monroe County, Michigan, and has the potential to emit more than 100 tons per year each of NO_x, SO₂, and particulate matter (PM). The plant consists of four cell burner boilers originally constructed in the early 1970s. Each boiler is connected to a turbine generator with a capacity of 750 to 795 megawatts (MWs).

18. The Monroe power plant is a fossil fuel-fired steam electric plant of more than 250 million British thermal units per hour and is therefore a “major stationary source” within the meaning of 40 C.F.R. § 52.21(b)(1)(i)(a); and a “major emitting facility” within the meaning of Section 169(1) of the Act, 42 U.S.C. § 7479(1). *See also* Michigan Admin. Code R. 336.2801(cc).

19. On March 12, 2010, DTE sent a “Planned Outage Notification” letter (“Notification Letter”) to the Michigan Department of Environmental Quality (now known as the MDNRE). The Notification Letter stated that DTE was going to begin a 12-week outage at

Monroe Unit 2 on or about March 13, 2010 and described the activities that would take place during the outage.

20. The construction activities that DTE commenced on or about March 13, 2010, include, but are not limited to the following work on the unit's boiler: replacement of economizer tubes; replacement of reheat pendants; and replacement of a section of waterwall tubes and burner cells.

21. EPA has calculated that the replacement projects identified in Paragraph 20 are major modifications under the Clean Air Act and the Michigan implementing regulations, as they will result in projected emissions increases in excess of 40 TPY of NO_x and SO₂.

VIOLATIONS

Prevention of Significant Deterioration and Non-Attainment New Source Review

22. The physical change identified in the Paragraph 20, above, resulted in a significant net emissions increase, as defined at Michigan Admin. Code R. 336.2801 to 336.2830 and 40 C.F.R. Part 51, Appendix S, of SO₂, NO_x, PM_{2.5}, ozone and/or PM.

23. The physical change identified in Paragraph 20, above, constitutes a "major modification," as that term is defined at Michigan Admin. Code R. 336.2801 to 336.2830 and 40 C.F.R. Part 51, Appendix S.

24. For the physical change identified in Paragraph 20, above, DTE failed to obtain a PSD and/or non-attainment NSR permit as required by Michigan Admin. Code R. 336.2801 to 336.2830 and 40 C.F.R. Part 51, Appendix S.

25. DTE is in violation of PSD requirements, Section 165 of the Act, 42 U.S.C. § 7475, and Michigan Admin. Code R. 336.2801 to 336.2830 for constructing a major modification, as identified in Paragraph 20, above, to an existing major source at its Monroe power plant without applying for or obtaining a PSD permit, and operating the modified unit without installing BACT or going through PSD review, and installing appropriate emission control equipment in accordance with a BACT analysis.

26. DTE is in violation of non-attainment NSR requirements, Sections 171-193 of the Act, 42 U.S.C. §§ 7501-7515, and 40 C.F.R. Part 51, Appendix S, Emission Offset Interpretative Ruling, for constructing a major modification, as identified in Paragraph 20, above, to an existing major source at its Monroe power plant without applying for a permit, and operating the modified unit without installing LAER, obtaining Federally enforceable emission offsets at least as great as the new or modified source's emissions, certifying that all other major sources that it owns or operates are in compliance with the Act, and demonstrating that the benefits of the proposed source or modification significantly outweigh the environmental and social costs imposed as a result of its construction or modification.

ENFORCEMENT AUTHORITY

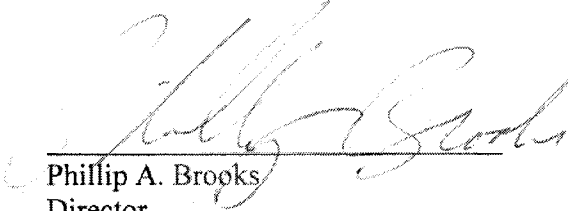
27. Section 113(a)(1) of the Act, 42 U.S.C. § 7413(a)(1), provides that at any time after the expiration of 30 days following the date of the issuance of a Notice of Violation, the Administrator may, without regard to the period of violation, issue an order requiring compliance with the requirements of the state implementation plan or permit, issue an administrative penalty order pursuant to Section 113(d), or bring a civil action pursuant to Section 113(b) for injunctive relief and/or civil penalties.

28. Section 113(a)(3) of the Act, 42 U.S.C. § 7413(a)(3), provides in part that if the Administrator finds that a person has violated, or is in violation of any requirement or prohibition of any rule...promulgated...under...[Title I of the Act], the Administrator may issue an administrative penalty order under Section 113(d), issue an order requiring compliance with such requirement or prohibition, or bring a civil action pursuant to Section 113(b) for injunctive relief and/or civil penalties.

29. Section 113(b) of the Act, 42 U.S.C. § 7413(b), authorizes the Administrator to initiate a judicial enforcement action for a permanent or temporary injunction, and/or for a civil penalty of up to \$25,000 per day for each violation occurring on or before January 30, 1997; up to \$27,500 per day for each such violation occurring on or after January 31, 1997, and up to and including March 15, 2004; up to \$32,500 per day for each such violation occurring on or after March 16, 2004 through January 12, 2009; and up to \$37,500 per day for each such violation occurring on or after January 13, 2009, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701, 40 C.F.R. § 19.4, and 74 Fed. Reg. 626 (Jan. 7, 2009), against any person whenever such person has violated, or is in violation of, *inter alia*, the requirements or prohibitions described in the preceding paragraphs.

Dated

6/4/10


Phillip A. Brooks
Director

Air Enforcement Division

CERTIFICATE OF MAILING

I, Ilana Saltzbart, certify that I sent a Notice of Violation and Finding of Violation, EPA-HQ-2010-MI-1, by Certified Mail, Return Receipt Requested, to:

Skiles W. Boyd, Director of Environmental Management
Detroit Edison Company
2000 Second Ave.
Detroit, MI 48226-1279

I also certify that I sent copies of the Notice of Violation and Finding of Violation by Certified Mail, Return Receipt Requested, to:

Michael Solo, Esq.
DTE Energy
One Energy Plaza
Detroit, MI 48226-1279

Thomas Hess, Unit Supervisor
Compliance and Enforcement Section
Michigan Department of Natural Resources and Environment
Air Quality Division
P.O. Box 30260
Lansing, Michigan 48909

Teresa Seidel, District Supervisor
Michigan Department of Natural Resources and Environment
Southeast Michigan District Office
27700 Donald Court
Warren, Michigan 48092-2793

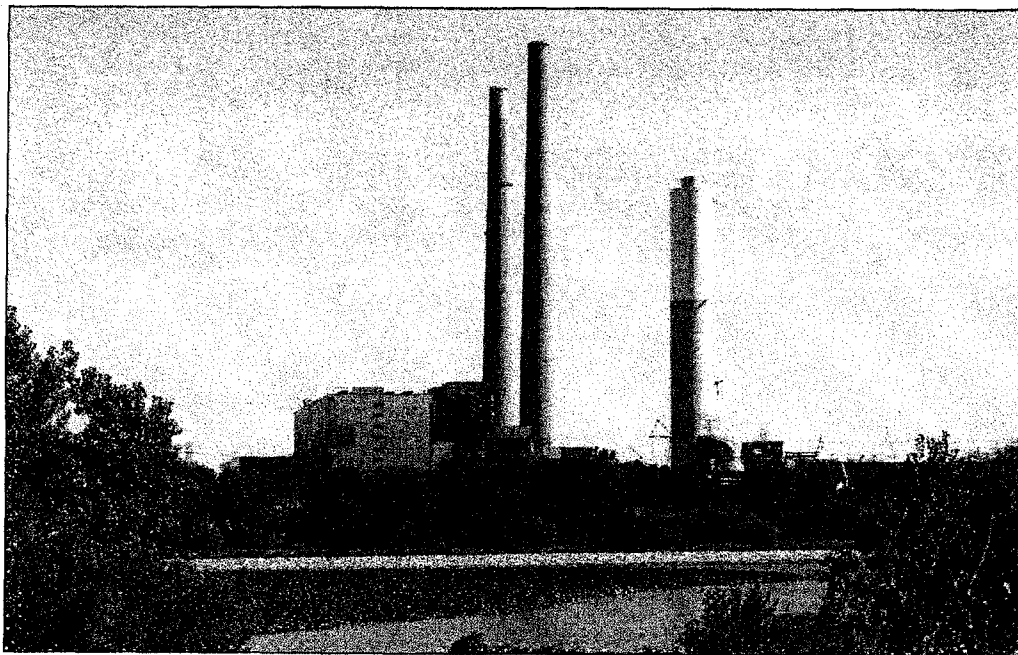
Jack Larsen, District Supervisor
Michigan Department of Natural Resources and Environment
State Office Building, 4th Floor
301 E. Louis B. Glick Highway
Jackson, Michigan 49201

On the 4th day of June, 2010

CERTIFIED MAIL RECEIPT NUMBER: 7008 2810 0001 0214 1544

EXHIBIT 2
TO DEFENDANTS'
MEMORANDUM OF LAW
IN SUPPORT OF MOTION
FOR PROTECTIVE
ORDER

Monroe Power Plant Unit #2 2010 Periodic Outage Preparation Status Report



**Outage Manager – Len Kantola 4-2450
Unit Engineer – Chris Essex 4-2416
Operations Coordinator – Steve Mazur 4-2458
Controller – Robin McNeely 4-2213**

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1. Introduction

- The Unit 2 Periodic Outage is scheduled to begin March 13 and end June 9, 2010.
- This outage Sunday will not be a work day – and only very, very limited work will be done on Sundays.
- The last MONPP Unit 2 Major Periodic Outage was in spring 2005.
- The next MONPP Unit 2 Mid Cycle Periodic Outage is scheduled for 2013.

1a. General Expectations – Len Kantola

- Meeting will start and finish on time
- All discussion should be accurate, brief and factual - detailed discussion and opinions will be taken “offline”
- Introduction of guests

1b. Safety – Deb Isley

- Remind everyone to discuss Safety as part of discussion.
- Provide list of specific actions we can take to work more safely.
- Discuss preparations for Safety Stand Down – Scheduled for March 10 from 10:00 to 12:00 at MAC for DTE Employee's and onsite for Contract Employee's..

2. Goals**2a. Goal Overview – Len Kantola**

Description	Current	Goal
1. Lost Work Day Cases (Count)	0	0
2. OSHA Recordable Injury Rate (#/200,000 man-hours)	0	< 1.7
3. Incidents involving improper handling of Asbestos	0	0
4. Reportable Spills & Opacity Exceedances	0	0
5. Startup Opacity Exceedances	0	< 3
6. Outage Duration	88.3	< 88.3 Days
7. O&M Budget (Direct Incremental O&M)	\$12,300,000	\$12,300,000
8. Small Capital Budget	\$2,032,751	\$2,032,751
9. Large Capital Budget	\$51,223,348	\$51,223,348
10. Original Work Scope Completion (%)	100 %	> 98 %

Note 1 – Pro Mod Duration is 91 Days, since our Fos Gen Target is 3% improvement under Pro Mod, our Duration Goal is 88.3 Days.

Note 2 – Outage Duration was increased by 9 Days on Jan 5, to remove Sunday as a normal work day, which resulted in the following savings forecast savings:
 reduced O&M Forecast & Budget by \$200K,
 reduced MTG Capital Project estimates for PMP's 2959, 5524 & 4218 by \$275K,
 reduced Boiler Capital Project estimates for PMP's 0705, 5240 & 5685 by \$1.501M

3. Status Update**3a. Work Order Update – Randy Spaulding**

Work Order Status	Apr 15	May 6	Jun 10	Jul 1	Aug 5	Sep 2	Sep 30	Nov 4
PM's / Routines to Initiate [1489 total]	1498	1498	1498	1498	1257	1169	400	44
Non PM's / Routines to initiate	1000	1000	900	850	850	800	510	400
Waiting Approval	0	0	1	1	1	1	1	1
In Planning	21	33	63	81	86	104	176	202
Waiting for Engineering/Project	1	1	6	6	6	6	6	6
Waiting for Material	0	3	13	13	13	13	15	15
Ready to Work	59	71	146	183	530	611	1338	1778
In Progress, Complete or CX'd	0	0	1	1	2	2	3	5
Total Work Orders	2579	2606	2628	2633	2745	2706	2449	2451
% Ready to Work	2%	3%	6%	7%	20%	23%	56%	74%
Goal Ready to Work	0%	0%	1%	3%	20%	30%	60%	70%

Work Order Status	Dec 2	Dec 16	Jan 6	Jan 20	Feb 3	Feb 17	Mar 3	Mar 10
PM's / Routines to Initiate [1489 total]	0	0	0	0	59	0	0	
Non PM's / Routines to initiate	200	180	150	110	100	75	25	
Waiting Approval	2	2	2	2	1	1	1	
In Planning	258	256	270	274	289	233	100	
Waiting for Engineering/Project	6	6	7	6	5	0	0	
Waiting for Material	15	12	11	9	8	12	17	
Ready to Work	1883	1853	1861	1818	1902	1990	2100	
Working or Complete	10	9	12	13	27	44	75	
Total Work Orders (exclude cx'd)	2374	2318	2313	2232	2391	2355	2318	0
% Ready to Work	80%	80%	81%	82%	81%	87%	95%	0%
Goal Ready to Work	75%	80%	85%	90%	95%	96%	98%	99%

NOTE: Still Need Work Orders initiated for: misc support WO's (scaffold / insulation etc) (~50).

3b. Budget Update – Robin McNeely

- Provide PO listing & Spend-to-Date data for O&M and Capital Projects [as of Feb 18: O&M: \$100K, Capital: \$1.5M].
- Cost Tracking Work Orders (Do not use these Work Orders until the outage starts):
 - Parent Work Order 30517352 for O&M
 - Boiler System (210D) WO 30518008
 - Chemical Cleaning (210L) 30683167
 - Electrical System (210K) WO 30518057
 - Instrumentation System (210N) WO 30518096
 - Draft System (210F, 210G, 210H, 210I) WO 30518114
 - Water System (210A, 210B, 210C, 210M) WO 30518125
 - Planning & Scheduling Work Order 30517352
 - Main Unit Trf & SS #61 (210K) WO 30518191
 - Turbine System (210J) WO 30518143
 - Coal Mill (210P) WO 30518231
 - Burner Line (210P) WO 30517383
 - Startup Team WO 30968800

3c. Schedule Update – Sean Romanowski

- Ensure support Work Orders (i.e. scaffold & insulation) have proper Parent Work Order listed.
- Identify Critical Path & Current status / issues.

3d. Supply Chain Requisition and Warehouse Update – Beth Kennedy

- Material & Service Requisition update & Warehouse Update
- Provide handout listing all materials that are ordered and not yet received, with anticipated receipt dates.
- Discuss preparations for Contractor Team Building Meeting – Scheduled for March 5 from 08:00 to 10:00.
- Provide update on how we determine if chemicals are approved for site use.

4. Team / Task Updates**4a. Maintenance Team Update – Lee Miera**

Location	I&C Techs	Elect- ricians	Boiler- makers	Mill- wrights	Crafts- men	Supply Person	Techs	Super- visors
TCHPP	1	0	1	1	0	0	0	0
RRGPP	2	0	0	0	0	0	0	0
MONPP	8	11	14	12	4	0	0	2
MONPP F.S.	0	0	1	1	0	0	0	0
FERMI	0	0	0	0	0	0	0	1
TURBINE	0	0	0	28	0	0	0	4
MEP	0	0	0	0	0	7	0	0
WSC	0	0	3	0	0	0	0	0
PERT/ESO/Rot Eq	0	0	0	0	0	0	10	0
Totals	11	11	19	42	4	7	10	7

- Attachment C's for all work (O&M and Capital) that is to be contracted, will be submitted by the Maint Supervisors assigned to associated equipment (refer to Org Chart in Section 3a).

4b. Operations Team Update – Steve Mazur

- Current status / issues of Shutdown and Startup plan & schedule.

4c. Engineering Team Update – Chris Essex

- Use Furmanite for Stress Relieving.
- Use System One for X-Rays.
- Use DTE & Structural Integrity for NDE.
- Current status of inspection plan.

4d. WGI Team Update – Chris Denunzio

- Current status / issues

4e. Support Team Update – Anita Griffin

- Use Brand for Scaffold installation & removal
- Use Deco & API Insulation removal & installation
- Use D2 for lead & asbestos abatement

5f. Area Coordinator Update – Clyde Smith

- Review lay down & work plans around 1/2 Stack and ensure proper precautions (concur with Deb Isley).
- Use PSC for vacuum, washing, grit blasting
- Use PSC for Confined Space Rescue
- Review Current Lay Down Map

4g. Outage Mobilization – Len Kantola

- Craft Start Times [*generally* - WGI & Brand: 06:00-16:30 & 18:00-04:30, otherwise: normal start times]
- Contractor Craft Work Hours [*generally* - Boiler & MTG: 6 Days / week, otherwise: 5 Days / week]
- DTE Work Hours [*generally* – Craft: 07:00-17:30 & 21:00-07:30 Days week, non Craft: 5 Days week]
- Additional Warehouse, Security & Nurse Coverage to support craft schedule [6 Days / week]
- Cafeteria Hours: Mon thru Sat: Breakfast 06:15-09:45, Lunch 10:45-12:30 & 23:00-01:00, Break 01:00-04:00.
- Inprocessing Training – March 15 thru 19 from 07:00 to 09:00 and 19:00 to 21:00 in PAC Conference Room. To schedule a special class, contact Jeff Hensley at 384-2218.
- Review all Attachments

5. Capital Project Status**5a. Large Capital Projects Update – Chris Essex**

PMP	Description	Contacts	Design Issue	Work Orders	Parts Receipt	Contract Services	Schedule Status	PAT 2 Status?	Target Cost
0705	Replace Reheat Pendants [GL I.000022.0073.xxx] [Cost Cap 30008056]	Proj Mgr: Phil Hinz Planner: Jerry Brake Scheduler: Dan Koppenaal Craft: WGI	Ready	Ready	Ready	Ready	Ready	Ready	14,500,000
2758	Expansion Joint Replacement (10 total) (AH gas side) [GL I.000022.0091.xxx] [Cost Cap 30617727]	Proj Mgr: Jim Polsgrove Proj Eng: Tom Norfolk Planner: Jerry Brake Scheduler: Dan Koppenaal Craft: WGI	Ready	Ready	Ready	Ready	Ready	Ready	800,000
2959	Install Static Exciter [GL I.000022.0052.xxx] [Cost Cap 29817145]	Proj Mgr: Mark Kimmel Planner: Art Parrack Scheduler: S. Romanowski Supervisor: Rhonda Bond Craft: Motor City Elect, I&C, Elect, PERT	Ready	Ready	March 20	Ready	Ready	Ready	6,394,600
4218	Generator Lead Box Replacement [GL I.000022.0079.xxx] [Cost Cap 29033949]	Proj Mgr: Mark Kimmel Planner: John LaCasse Scheduler: S. Romanowski Supervisor: Rhonda Bond Craft: Duke & Duke	Ready	Ready	Ready	Ready	Ready	Ready	3,509,995
5240	Replace Economizer Tubes [GL I.000022.0081.xxx] [Cost Cap 29359396]	Proj Mgr: Phil Hinz Planner: Jerry Brake Scheduler: Dan Koppenaal Craft: WGI, I&C	Ready	Ready	Ready	Ready	Ready	Ready	14,500,000
5524	Generator Rotor Rewind [GL I.000022.0082.xxx] [Cost Cap 29825913]	Proj Mgr: Mark Kimmel Planner: John LaCasse Scheduler: S. Romanowski Supervisor: Dominic Mento Craft: Turbine Team, I&C, Motor City Elect	Ready	Ready	Ready	Ready	Ready	Ready	3,530,753
5637	210 Valve Replacement [GL I.000022.0085.xxx] [Cost Cap 29665358]	Proj Mgr: Jim Polsgrove Planner: Jerry Brake Scheduler: S. Romanowski Craft: DTE, Elect, I&C	Ready	Mar 5	Mar 10	Ready	Ready	Feb 17	347,000
5680	4160v Cable Replacement [GL I.000022.0089.xxx] [Cost Cap 30478451]	Proj Mgr: Jim Polsgrove PE: Tom Norfolk Planner: Jerry Brake Scheduler: S. Romanowski Craft: Conti Elect, PERT	Ready	Ready	March 15	Ready	Ready	Ready	678,000
5685	Waterwall Panel Replacement [GL I.000022.0087.xxx] [Cost Cap 30399298]	Proj Mgr: Phil Hinz Planner: Jerry Brake Sch: Dan Koppenaal Craft: WGI	Ready	Ready	Mar 5	Ready	Ready	Ready	6,022,000
6354	Replace SS Trf #62 [GL I.000022.0088.xxx] [Cost Cap 30478977]	Proj Mgr: Jim Polsgrove PE: Elaine Harrison Planner: Jerry Brake Scheduler: S. Romanowski Craft: Dist Ops, PERT, I&C	Ready	Ready	Mar 20	Ready	Ready	Ready	941,000
Total Large Cap Budget									51,223,348

5b. Small Capital Projects Update – Chris Essex

PMP	Description	Contacts	Design Issue	Work Orders	Parts Receipt	Contract Services	Schedule Status	Target Cost (\$)
3071	Install Boiler Feed Pump TSI [I.000171.0205.0001] [Cost Cap 30777268]	Proj Mgr: Reid Rodgers Planner: Art Parrack Sch: Sean Romanowski Craft: Elect, I&C, PERT	Ready	Ready	Ready	Ready	Ready	283,000
3422	Replace Coal Silos 2, 3 & 5 [GL I.000022.0093.xxx] [Cost Cap 30815048]	Proj Mgr: Al Thom Planner: Al Thom Sch: Sean Romanowski Craft: RMF	Ready	Ready	Ready	Ready	Ready	545,000
3896	Replace 130/260v Battery Chargers [GL I.000171.0234.xxx] [Cost Cap 30885910]	Proj Mgr: Lee Miera Planner: Art Parrack Sch: Sean Romanowski Craft: Elect, PERT	Ready	Ready	April 16	Ready	Ready	49,751
3920	Rebuild SBFP [I.000171.0210.0001] [Cost Cap 30801402]	Proj Mgr: Mark Kimmel Planner: John Lacasse Sch: Sean Romanowski Craft: Turbine Team	Ready	Ready	Ready	Ready	Ready	315,000
6579	4160 Volt Circuit Breaker Upgrades (9) [I.000171.0206.0001] [Cost Cap 30772796]	Proj Mgr: Lee Miera Planner: Art Parrack Sch: Sean Romanowski Craft: Elect	Ready	Ready	Ready	Ready	Ready	90,000
6655	Pump Replacement-Contingency [I.000171.00143.0004] [Cost Cap 30772747]	Proj Mgr: Jim Drotar Planner: Randy Spaulding Scheduler: Larry Hailey Craft: DTE	Ready	Ready	Ready	Ready	NA	25,000
6656	Motor Replacement – Contingency [I.000171.00171.0004] [Cost Cap 30772764]	Proj Mgr: Jim Drotar Planner: Dennis Liska Scheduler: Larry Hailey Craft: DTE	Ready	Ready	Ready	Ready	NA	25,000
6657	Valve Replacement [I.000171.0170.0004] [Cost Cap 30772740]	Proj Mgr: Jim Drotar Planner: Randy Spaulding Scheduler: Larry Hailey Craft: DTE, WGI	Ready	March 11	March 11	Ready	Ready	550,000
6658	Asbestos Removal [I.000171.0207.0003] [Cost Cap 30778455]	Proj Mgr: Jim Drotar Planner: Randy Spaulding Sch: Sean Romanowski Craft: D2	Ready	Ready	Ready	Ready	Ready	100,000
6659	Lead Abatement [I.000171.0208.0003] [Cost Cap 30778572]	Proj Mgr: Jim Drotar Planner: Randy Spaulding Sch: Sean Romanowski Craft: D2	Ready	Ready	Ready	Ready	Ready	50,000
Total Small Capital Budget								2,032,751

6. Milestone & Action Item Update**6a. Discuss Overdue & Upcoming Milestones and Action Items – Len Kantola**

#	Owner	Contract Services	Date	Status
01.21b	Lee Miera	Initiate Requisitions for (8) MOV Actuators to be sent offsite for refurb.	02/12/10	
02.16c	Chris Denunzio	Provide estimate for DA Tank Repairs	02/19/10	
01.21d	Ted Saranchuk	Initiate Req's for: 1) Fumanite (Heat Treat SBFP Disch vlv / spool piece), 2) VRS (7S FWH outlet vlv), 3) VRS (East Closed Loop Cooler Relief vlv)	02/19/10	
01.21e	Mark Kimmel	Initiate Req's for: 1) Kennedy Pump (BFP Seals), 2) Hanson (Gland Strm Condensers), 3) API (Cap Proj Insul).	02/19/10	
02.16a	Dan Chinavare	Intitiate Req for Bergen Power (Snubber Rebuilds).	02/19/10	
02.23a	John Hammer	Initiate PR for C B P Engineering to perform Burner Line repairs.	03/05/10	
#	Owner	Financial	Date	Status
M34	Robin McNeely	Obtain Budget / MA-16 Approval for Outage.	02/15/10	
M37	Robin McNeely	Outage Scorecard Developed; begin routine budget updates.	03/05/10	
#	Owner	Job Safety Analysis	Date	Status
2.08a	Anita Griffen	Create JSA for installation of ID Fan restraints & inlet damper foam.	02/28/10	Complete
02.17b	Chris Denunzio	Create JHA for installation / removal of bulkhead at "G" Duct.	02/28/10	DRAFT
#	Owner	Follow Up Items from Readiness Review / Prior Outages	Date	Status
#44 #76	Randy Spaulding / Dave Proffitt	Need to develop a standard (ie – interim alteration checklist) form to ensure that all equipment manipulations are properly documented and restored. [Unit 1 follow up item].	02/19/10	Ref Unit 1 Startup Delays
02.25a	Chris Essex	Provide forecast: ROF benefit, Forced Outage avoidance, O&M Savings, and expected Health Report improvements to Paul Fessler	03/06/10	Ref:Readiness Review Mtg
02.25b	Beth Kennedy	Provide communications to site on ways to determine if material is approved for use at MONPP.	03/06/10	Ref:Readiness Review Mtg
#	Owner	Misc	Date	Status
12.03a	Lee Miera	Submit Attachment C for all work to be contracted.	02/28/10	
02.18a	Len Kantola	Determine if more elevator repair support coverage is required for otg.	03/01/10	Resolve with Phil H.
02.09a	Len Kantola	Create Startup Checklist	03/05/10	
M49	Chris Essex	All Operations & Testing Procedures Developed.	03/05/10	
30882969	Kerry Kotowski	Fabricate bulkhead for installation in ID Discharge Ductwork.	03/09/10	
M50	Len Kantola	Begin Outage.	03/13/10	

7. Wrap-up – [each Meeting]

7a. Future Meeting Schedule – Len Kantola

- **Contractor Team Building Meeting** – March 5 from 08:00 – 10:00 PAC 1&2
- **Building Trades Meeting** – March 4 from 11:00 – 12:30 Pipefitters Local 309
- **Startup Review – [Last Two Weeks of Outage]** Mar 8 from 12:00 – 13:00 2nd Floor Conference Room
- **Safety Stand Down** – March 10 from 10:00 – 12:00 DTE: MAC, Contractors: TBD
- **Regular Outage Meeting** begin – March 12 from 10:00 – 11:00 in 1/2 Conference Room

7b. Safety – Deb Isley

7c. Final Comments – Len Kantola

END

Attachment 1 Organization Chart

Key Outage Positions:		Days:	Afternoon / Nights:			
		Name(s)	Name(s)	Note		
Outage Manager	Len Kantola		Assistant Shift Supervisor	O		
Ops Coord & S/D & S/U Manager	Steve Mazur					
Unit Engineer	Chris Essex				N/A	X
Financial Controller	Robin McNeely (O&M), Jay Oswalt (Capital)				N/A	X
Industrial Safety	Deb Isley, Dan Gumola		WGI Safety Rep	O		
Environmental Safety	Chuck Larlham		Chuck Larlham	C		
WGI Project Lead	Chris Denunzio		Marty McElvaney	O		
Scheduling	Sean Romanowski, Larry Hailey Dan Koppenaal (WGI Capital Projects)		N/A	X		
Outage Center Coordinator	Donna Devillez		N/A	X		
Operations Tagging Leaders	[Shift Tagging Center Coverage]			O		
Area Coordinator	Clyde Smith		N/A	X		
Work Order Planning	Randy Spaulding, Art Parrack		[see shift coverage schedule]	O		
NDE Inspection Coordinator	Rob Fenech (Boiler / HEP) Ted Saranchuk (FW/FAC)		N/A	X		
Supply Chain – Warehouse	Sheryl Reed		[see shift coverage schedule]	C		
Supply Chain – Buyer	Beth Kennady		On Call Buyer	C		
Supply Chain – Stock Analyst	Karen Byers		[see shift coverage schedule]	C		
Outage Process Improvement	Ben Goehmann		N/A	X		
Inprocessing Coordinator	Jeff Hensley		N/A	X		
Capital Projects	Chris Essex		N/A	X		
Local 223	Tom Mator, John Massengill, Dan Hubbard		N/A	X		
Project Leads	Scope	Days:	Afternoon / Nights:			
		Key Team Members (s)	Supervisor (s)	Note		
Turbine & Boiler Feed Pump Systems Mark Kimmel (Lead)	Turbine, Auxiliaries, Valves	Tim Keen (General Foreman) Rhonda Bond (Supervisor) Matt Donbrosky (Supervisor) Greg Howes (Supervisor) John Lacasse (Planner)	Dominick Mento (Supervisor) Duane LeBrun (Supervisor)	O		
Boiler Systems Dan Chinavare (Lead)	Boiler Systems	Tim Bolger (Econ & Exp Jnt Supv) Jeff Donbrosky (Rht & WW Supv) Mike Thompson (DTE O&M Supv) Dale McElvaney (WGI Super.)	Mike Szczepaniak (Econ Supv) Craig Spencer (O&M/Rht/WW) Jeremy Durbin (WGI Super.)	O		
Water Systems Ted Saranchuk (Lead)	Water Systems	Chuck Martin (Supervisor)	Jamie Dupree (Supervisor)	O		
Draft & Fuel Burning Systems Saied Labaf (Lead)	Draft Systems	Chuck Black (Supervisor)				
	Fuel Burning	Jerome King (Supervisor)				
	Burner Lines	TBD (WGI Superintendant)				
Support Team Anita Griffin (Lead)	Scaffold	Anita Griffin (Supervisor)				
	Insulation	Joan Blalark (Supervisor)				
	Vacuum etc	Clyde Smith (Supervisor)				
Electrical Systems Lee Miera (Lead)	Temporary Power	Joe Pagano (Coord) Glenn Paulette (Projects Temp Pwr)	Not Applicable [Day Shift Only]	X		
	Electrical Systems	Lee Miera (Supervisor)				
		Dave Matatall (Supervisor)				
	Switchyard	Dave Malmsten (Supervisor)				
I&C Systems Dave Proffitt (Lead)	Instrumentation	Mike Schulte (Lead)				
		Dave Proffitt (Supervisor) Ben Cross (Planner)				

NOTE: O = On-Site, C = On-Call, X = Not Required.

Attachment 2 Scope Overview

1. Boiler System Overview

- Explosive clean, vacuum & wash Boiler (PSC).
- Replace Economizer Tubes – Capital Project PMP 5240 & Reheat Pendants – Capital Project PMP 705 (WGI).
- Replace ~2000 Square Feet of Water Wall Tubes & 3 Burner Cells – Capital Project PMP 5685.
- Perform High Energy Piping Inspections (DTE) & boiler inspections (DTE).
- Perform Seal Trough and Bottom Ash repairs (WGI), Bottom Ash Gate repairs (WGI) and Refractory repairs (TBD-Bid).
- Perform Boiler Tube Chemical Cleaning (TBD-Bid), replace 210 Valve – Capital Project PMP 5637 (Deco).
- Perform Stub Tube inspection (Structural Integrity) & repairs (WGI).

2. Turbine & Boiler Feed Pump System Overview

Main Turbine Generator

- Rewind MTG Rotor – Cap.Proj.PMP 5524 (Deco), Install Static Exciter – Cap.Proj.PMP 2959 (Motor City Electric).
- Thrust & #4 Brg Pedestal: repair T/C's @ 2, 3, 4 & Thrust Brg (Deco), send MTG Turn Gear Motor out for cleaning (York).
- Overhaul Ventilator Valves, Throttle Valves, Governor Valves, Reheat Stop Valves and Intercept Valves (Deco).
- Generator Lead Box Replacement – Capital Project PMP 4218 (Duke and Duke).
- Install Fine Mesh Screens in Throttle Valves & Intercept Valves, to be removed during Strainer Removal Outage (Deco).
- Send MTG Turning Gear motor, Turning Gear Oil Pump motor, and N & S DEH Pump motors offsite for cleaning (York).
- Gland Steam Condenser offsite Rebuild (Hanson), perform MTG Overspeed testing on Shutdown.

North & South Boiler Feed Pump Turbines

- Replace North & South Boiler Feed Pump Seal Sleeves (Deco).
- Overhaul North Boiler Feed Pump Turbine (Deco) & Rebuild South Boiler Feed Pump – PMP 3920 (Deco).
- Overhaul North & South HP & LP Boiler Feed Pump Turbine Valves (Deco).
- Perform Overspeed testing of SBFPT on Shutdown and NBFPT on Startup (Deco).
- Install Boiler Feed Pump TSI – Capital Project PMP 3071 (Deco).

3. Water System Overview

- Clean Main Unit & Boiler Feed Condenser tubes (Ops), Hydro Main Condenser & BFP Condensers (Ops).
- Internal inspection of Main Condenser, Boiler Feed Pump Condensers & DA and DA Storage Tank (Deco).
- Perform Flow Accelerated Corrosion (FAC) inspection and repairs (Deco).
- Perform inspection and testing of Feedwater Heaters & Drain Coolers (Deco), inspect 6S FWH shell (Deco).
- Send N / C / S Heater Drains Pump motors out for cleaning (Deco / York).
- Clean Circ Pump Intake areas [Trash Bars -Pre Outage / Pump Bay – Outage] (Commercial Diving).

4. Draft & Fuel Burning System Overview

Draft Systems

- Vacuum & Grit Blast Precips (PSC), inspect & repair Precips (Deco), upgrade SIR Volt/Amp indicators (DTE).
- Rebuild N & S Forced Draft Fan Inlet Dampers (Deco), Inspect ID Fan Blades (Deco).
- Replace N & S PA Fan Lube Oil Cooler Radiators (Deco).
- Install bulkhead in ductwork and repair N & S ID Fan Guillotine Dampers (WGI)
- Send N & S ID Fan motors out for cleaning (Deco / Helo), send North FD Fan motor for cleaning (Deco / York).
- Wash Combustion Coils (Ops).
- N & S Air Heater inspect/repair (WGI), N & S Air Heater Drive inspect/repair & balance North Air Heater (CCI).
- Replace (10) Air Heater Gas Side Expansion Joints – Capital Project PMP 2758 (WGI).

Fuel Burning Systems

- Vacuum Coal Mills (PSC), routine inspection, testing & repairs to Coal Mills (Deco).
- Perform repairs to (7) Burner Lines and one coupling (WGI).
- Perform 4K Hour inspection on Mills 2-1, 2-2, 2-4 and 2-6.
- Perform Rebuild of Coal Mill 2-7.

5. Electrical System Overview

- Replace System Service Transformer #62 per Capital Project PMP 6354.
- Perform testing of Meters, Relays, Motors, Generator and Exciter (PERT & Meter Dept Support).
- Install & remove Temporary Power (Deco & WGI), replace 130/260v Battery Chargers per PMP 3896 (Deco).
- Replace 4160v Cables from SS Trf per Capital PMP 5680 (Deco / Conti Electric).
- Send out 13 – 480v Circuit Breakers to have Static Trip Devices upgraded (WSC).
- Send out 9 – 4160v Circuit Breakers for rebuild– Capital Project PMP 6579 (Breaker Experts).
- Send out 9 – motors for cleaning & inspection (Deco / Helo / York).

6. Instrumentation System Overview

- Perform routine testing Instrumentation (DTE).

Attachment 3 Time Charges

DTE Time Charge Work Order #'s for Unit 2 Periodic Outage			
Discipline	Name	Straight Time	Overtime
Outage Manager	Len Kantola	30517352	N/A
System Lead - Instrument	Dave Proffitt	normal Work Order	30911837 Task 10
System Lead - Electrical	Lee Miera	normal Work Order	30911761 Task 30
System Lead - Boiler	Dan Chinavare	30518008	30921316
System Lead - Turbine	Mark Kimmel	30911810 Task 20	30911810 Task 20
Water System lead	Ted Saranchuk	30518125	30518125
Air / Flue Gas System Lead	Saied Labaf	30518114	30518114
Unit Engineer	Chris Essex	normal Work Order	30911810 Task 30
Safety Personnel & Nurse O.T.	Lee Davis	normal Work Order	30911810 Task 10
	Deb Isley		
	Dan Gumola		
Outage Center Coordinator	Donna Devillez	30517352	30517352
Scheduler	Larry Hailey	TBD - PMP 2758 (50%) TBD - PMP 3422 (50%)	TBD - PMP 2758 (50%) TBD - PMP 3422 (50%)
Tech Group (O & M):	[Various]	Boiler System 30518008, Turbine System 30518143, Electrical System 30518057, Main Unit Trf 30518191, Draft System 30518114, Coal Mills 30518231, Burner Lines 30517383, Water System 30518125, Instrumentation 30518096	Boiler System 30518008, Turbine System 30518143, Electrical System 30518057, Main Unit Trf 30518191, Draft System 30518114, Coal Mills 30518231, Burner Lines 30517383, Water System 30518125, Instrumentation 30518096
Tech Group (Capital):	[Various]	Individual Capital Project	Individual Capital Project
MEP Security Support	[3 total]	30911761 Task 10	30911761 Task 10
MEP Elevator Support	[3 total]	TBD	TBD
Supply Chain / Warehouse	[Various]	normal Work Order	30921261
Operations Coordinator - Supv	Steve Mazur	normal Work Order	30921410
Shift Supv & Supervising Operators	[Various]	normal Work Order	30921535
(Non Supervisors) Operators	[Various]	30921535	30921535
Finance	Jay Oswald	normal Work Order	30517352
Support Team Lead	Anita Griffin	Normal Work Order	30911761 Task 20
Temp Power Coordinator	Joe Pagano	Normal Work Order	TBD - PMP 5680
Temp Power Supervisor	Glenn Paulette	30911837 Task 20	30911837 Task 20
F&MS #3/4 Elevators	[Various]	normal Work Order	normal Work Order
Turbine Craft Supervisors (O&M):	[Various]	30518143	30518143
Work Management Specialists	[Various]	Normal Work Order	30517352
MONPP Supervisors (O&M): Maintenance Foreman	[Various]	normal Work Order	Boiler System 30518008, Turbine System 30518143, Electrical System 30518057, Main Unit Trf 30518191, Draft System 30518114, Coal Mills 30518231, Burner Lines 30517383, Water System 30518125, Instrumentation 30518096
MONPP Supervisors (Capital): Work Management Specialists, Supervising Operators, Shift Supervisors, Maintenance Foreman, General Foreman	[Various]	normal Work Order	Individual Capital Project
Capital Project Supervisors:	[Various]	Individual Capital Project	Individual Capital Project
Deco Craft	[Various]	Individual Work Orders	Individual Work Orders

Start Up Team	[Various]	normal Work Order	TBD
"normal Work Order": charge Work Order used during non Outage times. Contact Len Kantola@ 4-2450 with any questions			

Attachment 4 Outage Meeting Schedule & Publications

1a. System Lead / Team Lead Meeting Schedule

- Location: Outage Center Days: Monday thru Friday Time: 10:00 – 10:30
- Attendees:

Len Kantola	Chris Essex	Steve Mazur
Jay Oswald	Dave Proffitt	Mark Kimmel
Chris Denunzio	Clyde Smith	Deb Isley
Dan Chinavare	Beth Kennedy	Saied Labaf
Donna Devillez	Sean Romanowski	Phil Hinz
Jim Polsgrove		Tom Mator
- Agenda: 1) Safety Overview 2) General Overview 3) Open Discussion

1b. Scope / Budget Review Meeting Schedule

- Location: Outage Center Days: Monday thru Friday Time: 10:30 – 11:00
- Attendees:

Len Kantola	Chris Essex	Steve Mazur
Jay Oswald	Donna Devillez	New scope sponsors
Lee Miera		Tom Mator
- Agenda: 1) Inspection Reports 2) Potential Scope adds / deletes 3) New Work Orders

1c. Startup Team Meeting Schedule

- Location: Outage Center Days: May 3,10, 17, 24 & June 1 Time: 10:30 – 11:00
- Attendees:

Len Kantola	Chris Essex	Steve Mazur
Lee Miera	Dave Proffitt	Mark Kimmel
Chris Denunzio	Clyde Smith	Anita Griffin
Ted Saranchuk	Saied Labaf	Reid Rodgers
Sean Romanowski	Phil Hinz	Tom Mator
John Massengill		Donna Devillez
		Jim Polsgrove
- Agenda: 1) Review Startup Checklist 2) Review Startup Schedule 3) Open Discussion

1d. Plant Senior Staff Brief Schedule

- Location: Outage Center Days: Thursday Time: 15:00 – 15:30
- Attendees:

Len Kantola	Randy DeWulf	Chuck Magrum
Joe Robinson	Kevin White	Steve Mazur
Jay Oswald	Phil Hinz	Chris Denunzio
Chris Essex	Lee Miera	Mark Hart
		Jim Polsgrove
- Agenda: 1) Review Weekly Scorecard 2) General Discussion

2a. Daily Safety Update

- Safety updates required immediately to Deb Isley in Mezzanine Office:
Team Leads System Leads Project Leads
- Daily Safety Updates Monday – Saturday by 16:00 (Update Flag, Safety Light & send site-wide email):
Deb Isley (lead)

2b. Daily Schedule Updates / Issue

- Updates Mon / Wed / Fri by 09:30 to Sean Romanowski in Outage Mgmt Office:
Supervisors (as identified on the Schedule) System Leads
- Issue Schedule Mon / Wed / Fri by 16:00 (Post on Website & available in Outage Mgmt Office):
Sean Romanowski (lead) Larry Hailey Dan Koppelaar

2c. Weekly Scorecard Updates / Issue

- Provide updates Thursday by 11:00 – to Robin McNeely in Mezzanine Office:
Sean Romanowski (Sch) Phil Hinz (Projects) Lee Miera (craft) Len Kantola (Commentary)
- Issue Scorecard Thursday by 17:00 (Post on Website & email Distribution):
Donna Devillez

Attachment 5 Weekend Coverage Schedule [March 13 / 14] – Sample Data

	Saturday Day	#	Saturday Night	#	Sunday Day	#	Sunday Night	#
Outage Manager	Len Kantola	1	N/A	0	Len Kantola	1	N/A	0
Unit Engineer	Chris Essex	1	Hydro Support	2	Chris Essex	1	N/A	0
Operations Coordinator & Ops #	Steve Mazur	8	Asst Shift Supv	4	Steve Mazur	7	Asst Shift Supv	1
Outage Center Coordinator	Donna Devillez	1	N/A	0	N/A	0	N/A	0
Boiler System Lead	Dan Chinavare	1	N/A	0	Dan Chinavare	1	N/A	0
Turbine System Lead	Mark Kimmel	1	N/A	0	N/A	0	N/A	0
Water System Lead	Ted Saranchuk	1	N/A	0	N/A	0	N/A	0
Air / Flue Gas System Lead	N/A	0	N/A	0	N/A	0	N/A	0
Electrical System Lead	N/A	0	N/A	0	N/A	0	N/A	0
Instrument System Lead	N/A	0	N/A	0	N/A	0	N/A	0
Capital Projects Lead	Phil Hinz	1	N/A	0	N/A	0	N/A	0
WGI Project Lead	N/A	0	N/A	0	N/A	0	N/A	0
Instrument Foremen & craft # (DTE & Contract)	Dave Proffitt							
Electrical Foremen & craft # (DTE & Contract)	Lee Miera							
Mechanical Foremen & craft # (DTE & Contract)								
Scaff & Insul Lead & craft # (Brand, API, D2)					N/A	0	TBD (Brand & PSC)	
Logistics Foremen & craft # (Vacuum Contr)	Clyde Smith [DMS & PSC]	12	N/A	0	Clyde Smith [DMS]	8	N/A	0
Projects Foremen & craft # (DTE & non-WGI contract)	N/A	0	N/A	0	N/A	0	N/A	0
WGI Boiler Foremen & craft # (all WGI Boiler craft)	Chris Denunzio				N/A	0	N/A	0
WGI non-Boiler Foremen & craft # (all WGI non-boiler craft)	N/A	0	N/A	0	N/A	0	N/A	0
Turbine Foremen & craft # (DTE & Contract)	Matt Donbrosky	4	Dominick Mento	4	N/A	0	Dominick Mento	
Term Power Coordinator & craft (DTE & Contract)	Joe Pagano	5	N/A	0	N/A	0	N/A	0
Industrial Safety	Deb Isley	1	N/A	0	N/A	0	N/A	0
Environmental Safety	N/A	0	N/A	0	N/A	0	N/A	0
Security	N/A	0	N/A	0	N/A	0	N/A	0
Financial Controller	N/A	0	N/A	0	N/A	0	N/A	0
Scheduling	N/A	0	N/A	0	N/A	0	N/A	0
Work Mgmt Spec (Planning)								
Warehouse	[Canvas]	1	[Canvas]	1	N/A	0	N/A	0
Buyer	Beth Kennedy	1	N/A	0	N/A	0	N/A	0

Attachment 6 Unit 2 Periodic Meeting Agenda

1. Outage Overview – Len Kantola

- 1 a. Safety Issues in the past day
- 1 b. Critical work

☐ M – Weekend wrap-up ☐ T – Startup Preparations / SPI ☐ W – WO Closeout
☐ R – Weekend Work & Coverage / SPI ☐ F – Scorecard Review / Weekend Work & Coverage

Outage Day: _____
Days to Boiler Chem Cleaning: _____
Days to Boiler Hydro: _____

2. Operations Update & Plant Status– Steve Mazur

- 2 a. Tagging Center Issues & Safety Update

3. Engineering Update & Plant Status– Chris Essex

- 3 a. Inspection Status Update
- 3 b. Is there a need for a Scope Add Meeting afterwards? If Yes, who do we need to attend?

4. Boiler Update – Dan Chinavare

- 4 a. System Status
- 4 b. Boiler House 8th Floor thru 13th Floor Safety & Housekeeping Update
- 4 c. Critical Issues & Safety Update

5. Turbine Update – Mark Kimmel

- 5a. System Status
- 5b. Turbine Deck & Boiler Feed Pump Area Safety & Housekeeping Update

6. Air / Flue Gas Update – Saied Labaf

- 6 a. System Status
- 6 b. Precips & FD / ID Fan Area Safety & Housekeeping Update

7. Water System Update – Ted Saranchuk

- 7 a. System Status
- 8 b. Turbine Building 1st & 2nd Floor Safety & Housekeeping Update

8. Electrical Update – Lee Miera

- 8 a. System Status
- 8b. Switchgear Rooms, Main Unit Trf & System Service Trf #62 Area Safety & Housekeeping Update

9. Instrument Update – Dave Proffitt

- 9 a. System Status
- 9 b. Relay Room Safety & Housekeeping Update

10. Capital Projects Update – Phil Hinz / Jim Polsgrove / Mark Kimmel

- 10a. Project Status
- 10b. Boiler House 1st Floor thru 7th Floors, Boiler Internal Area Safety & Housekeeping Update – Phil Hinz

11. Schedule Update & Work Order Closeout Status – Sean Romanowski

- 11a. Provide List of Work Orders that are reported complete, but not closed out [W].
- 11b. Provide SPI, by System & by Team [T/R]

12. Finance Update – Jay Oswald

- 12a. Discuss any necessary financial information.
- 12b. Collect Head Count Sheet that is passed around
- 12c. Provide copies of Scorecard for Review [F]

13. Material / Warehouse Update – Beth Kennedy

- 13a. Discuss any material concerns

14. Safety – Deb Isley

- 14a. Safety Message for the Day

15. Wrap Up – Len Kantola

Attachment 7 Outage Scope Change Form

☐ Scope Addition ☐ Scope Change ☐ Scope Delete

Initiator/Date _____

WR/WO# _____ System _____

Component # _____

Activity Description _____

Status of WO or Design Change Documentation etc. _____

Reason for scope change _____

Can this work be done online? ☐ YES ☐ NO

What will be done to prevent similar scope add / change in the future? _____

What is impact to system / plant if work is **not** performed during outage? _____

Source of Activity (check appropriate sources)

☐ Leak ☐ Lost Megawatts
☐ Control Room Indication ☐ Corrective Action Number _____
☐ Temp Mod Number (i.e. interlock defeat) _____
☐ Other - Describe _____

Estimate

☐ Design - Hours _____ ☐ Testing - Hours _____
☐ Labor - Hours _____ ☐ Other - Hours _____
☐ Material - Hours _____ ☐ Cost - _____

<input type="checkbox"/> Approval	<input type="checkbox"/> Rejection	Initiator / Date _____
<input type="checkbox"/> Approval	<input type="checkbox"/> Rejection	Unit Engineer / Date _____
<input type="checkbox"/> Approval	<input type="checkbox"/> Rejection	System Foreman / Date _____
<input type="checkbox"/> Approval	<input type="checkbox"/> Rejection	Operations Coordinator / Date _____
<input type="checkbox"/> Approval	<input type="checkbox"/> Rejection	Outage Manager / Date _____

Forward approved copies to:

Initiating Work Group
 Financial Coordinator
 Operations Coordinator
 Work Management Specialist

Unit Engineer
 System Foreman
 Outage Manager

EXHIBIT 3
TO DEFENDANTS'
MEMORANDUM OF LAW
IN SUPPORT OF MOTION
FOR PROTECTIVE
ORDER

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

And

Civil Action No.
10-13101

NATURAL RESOURCES DEFENSE
COUNCIL, INC., AND SIERRA CLUB,

Proposed Intervener-Plaintiffs,

-v-

DTE ENERGY COMPANY AND
DETROIT EDISON COMPANY,

Defendants.

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION
BEFORE THE HONORABLE BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE
100 U. S. Courthouse & Federal Building
231 West Lafayette Boulevard West
Detroit, Michigan 48226
WEDNESDAY, JANUARY 19TH, 2011

APPEARANCES:

For the Plaintiff:

Thomas A. Benson, Esq.
Justin A. Savage, Esq.
Ellen Christensen, Assistant
United States Attorney

APPEARANCES (CONTINUED)

For the Defendants:	F. William Brownwell, Esq.
	Mark B. Bierbower, Esq.
	James W. Rubin, Esq.
	Michael J. Solo, Esq.
	Matthew J. Lund, Esq.

ALSO IN APPEARANCE:

For the Proposed Intervener-Plaintiffs:	Nicholas Schroeck, Esq.
--	--------------------------------

Court Reporter:	Joan L. Morgan, CSR Official Court Reporter
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Proceedings recorded by mechanical stenography.
Transcript produced by computer-assisted
transcription.

I N D E X

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MOTION FOR PRELIMINARY INJUNCTION
WEDNESDAY, JANUARY 19TH, 2011

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1 Detroit, Michigan

2 Wednesday, January 19th, 2011

3 (At or about 9:00 a.m.)

4 -- --- --

5 THE COURT: Good morning.

6 Call the case please.

7 THE CLERK: Case number 10-13101, USA versus DTE
8 Energy.

9 THE COURT: Okay. May we have appearances,
10 starting with the plaintiff, please.

11 MR. BENSON: Thank you, your Honor.

12 May I approach for a moment? Do you have copies
13 of the demonstratives that we will be using the hearing?

14 THE COURT: Yes. You provided me with a copy of
15 -- it's not the same one, is it?

16 MR. BENSON: This is different. I think you
17 should have the briefs and all the exhibits.

18 THE COURT: I have all the briefs and the exhibits
19 that you had indicated that you were going to use at the
20 hearing. These are in addition to that?

21 MR. BENSON: Right. These are demonstrative
22 exhibits that we will just be showing to you.

23 THE COURT: Oh, I see. That's fine.

24 Before we get appearances, it's my understanding
25 somebody wants to get sworn in?

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WEDNESDAY, JANUARY 19TH, 2011

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1 MR. RUBIN: Your Honor, we found out that those
2 folks were sworn in upstairs earlier.

3 THE COURT: Oh.

4 MR. RUBIN: So it's been taken care of.

5 THE COURT: Good. Thank you. Okay.

6 Starting with the plaintiff.

7 MR. BENSON: Okay. Good morning, your Honor.

8 Your name, please.

9 MR. BENSON: Good morning, your Honor,

10 Tom Benson for the United States. With me at
11 counsel table are Ellen Christensen, from the United States
12 Attorney's Office, and Justin Savage from the Department of
13 Justice in Washington.

14 THE COURT: Okay. And for the defendants, please.

15 MR. BROWNWELL: For the defense, William
16 Brownwell. I'm accompanied at counsel table by Mike Solo,
17 Detroit Edison; James Rubin, and Mark Bierbower. Matt Lund
18 is also with us.

19 THE COURT: Okay. Nice to see you all.

20 Let the record reflect today is the date and time
21 scheduled for a hearing on the Motion for Preliminary
22 Injunction. Have you guys talked about how to proceed? Do
23 you have anything in mind? Are we going proceed with
24 Opening Statements by each side, and then the plaintiff --
25 I'm not sure how you guys want to do it.

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1 emissions --

2 THE COURT: I'm not opposed to putting a date in
3 there. Should there be an alleged violation we have a
4 benchmark because I suspect if there should be that problem
5 how I am going to determine what the benchmark is. So we
6 can talk about whether it's February or what date it is in
7 a second, but what do you think about the trial?

8 MR. BROWNWELL: What is important, your Honor, are
9 annual emissions. Annual emissions are regulated under the
10 New Source Review Program is what triggered modification.

11 As far as the trial goes Detroit Edison has been
12 focused, of course, on preparing for this preliminary
13 injunction hearing and have had only a very limited
14 constrained period of time for its expert preparation, and
15 expert reports. So Detroit Edison would have difficulty in
16 getting ready for trial that soon if we want to supplement
17 its expert reports and expert discovery and perhaps other
18 discovery we thought we would need. The Government has had
19 a lot of discovery against Detroit Edison because it was
20 issuing administrative information under Section 114 of the
21 Clean Air Act going back to earlier this year. So Detroit
22 Edison would want sufficient time for discovery, experts'
23 supplementation and expert discovery.

24 We also are not sure, your Honor, just how big
25 this case is. They are talking about Monroe 2, but there's

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1 this other outstanding motion of violations in July of
2 2009, August, 35 additional projects. If this - the
3 Complaint would be amended to pick up additional projects
4 as the Government suggested that it might be to get a
5 preliminary injunction filed then it's a much different
6 case.

7 THE COURT: Well, two things: Number one, for the
8 Government, the only thing that is before me of what I've
9 read and what I'm concerned with today is the original
10 Complaint which is Monroe 2. Government, are we talking
11 about Monroe 2 or are we talking about something else?

12 MR. BENSON: Your Honor, I think for the expedited
13 trial we're talking about here, it would make sense to
14 focus on Monroe 2 because as the Court knows we've got all
15 the information for the most part together and I think if
16 Mr. Brownwell -- if you guys think there might be some
17 additional discovery, if they want to supplement expert
18 reports in a reasonable time maybe we'll do the same if
19 they do. We can figure out a way to work all that out I
20 think. We probably like to come back before the Court in
21 short order to hammer all that out. But if we want to go
22 ahead on that and then the Government is still considering
23 whether or not to bring additional claims I think those
24 would go forward on a separate track.

25 THE COURT: Those I don't know anything about.

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1 This one I think -- I feel fairly comfortable that in a
2 reasonable period of time if we concentrate on Monroe 2
3 that we can try this case. If it goes to other things I
4 can't deal with that now. As I've said, I've read it in
5 relation to this.

6 In terms of preparation --

7 MR. BROWNWELL: Your Honor, let me suggest if I
8 could that if the case is going to be limited to Monroe 2,
9 it might make sense for additional discussions on the case
10 management proposed order.

11 THE COURT: Well, I can do it today if we agree.
12 We're going to sit down and hammer out a schedule. I have
13 to know an end date first. I need to know whether it's 90
14 days, or 60 days or a 120 days, or it isn't then we can go
15 back and we can talk about when reports are due and so
16 forth.

17 Also, neither side as requested a jury and I have
18 no problems if you want to a jury. If either side wants a
19 jury you can have a jury trial. I don't know if you want
20 one or don't want one. Government, I'm not sure what your
21 position is. Again, it has nothing to do with timing. It
22 has to more to do with scheduling in terms of when we get
23 things done.

24 MR. BENSON: Your Honor, we are prepared to try it
25 before the Court. We won't have to have a jury.

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1 THE COURT: You won't hurt my feelings.

2 MR. BROWNWELL: Your Honor, we would like time to
3 consult with our clients.

4 THE COURT: Absolutely. Okay. It's not going to
5 change the dates. It doesn't make any difference to me.

6 In a way, I'll be very honest with you I find
7 this case interesting and probably -- I think if we had a
8 jury trial, you would probably have more community finality
9 either way and it may make some sense just from -- you
10 know, this is a major health issue. But just because it's
11 a major health issue doesn't mean, you know -- it's up to
12 you. Let's do it in a reasonable period of time because it
13 won't change it.

14 You know, I think 90 days is not unreasonable,
15 but certainly I need to check my schedule. I want to make
16 sure if we set a date it's a good date.

17 MR. BROWNWELL: Your Honor, we would request more
18 like a 120 days.

19 MR. BENSON: Your Honor, if I could respond to
20 that, this case was filed in August. It's been pending for
21 six months. I think this is something we can do in another
22 90 days as the Court has suggested.

23 THE COURT: I'll compromise. I'll split the
24 difference. I want to see my schedule.

25 I'm looking at May 3rd, May 2nd. Does anybody

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1 have a prepaid vacation or family event? I don't like to
2 interfere with any of those.

3 MR. BENSON: As far as I know I don't see any
4 problem on our side. I think that date is fine. I'm not
5 sure how long this trial will be. Particularly if it's a
6 jury trial they've taken up to two weeks.

7 THE COURT: I don't think it would take two weeks
8 if it was a non-jury trial.

9 If you need some time during the trial if you
10 need a day or something to take care of personal affairs or
11 do something --

12 MR. BROWNELL: Your Honor, I would ask for some
13 leeway to confer with counsel and possibly witnesses.

14 THE COURT: Why don't we do this? Why don't we
15 take a break. Why don't you confer. See if they want to
16 make a decision today on a jury or not, I don't care.
17 That's not going to affect anything today. What we'll do
18 is also kind of confer in terms of a scheduling order. I
19 don't see this case going away as to that issue on
20 dispositive motions so I don't think there's going to be
21 dispositive motions so we don't have to worry about that.
22 It will be a battle of the experts. So what we're really
23 talking about is scheduling, discovery and things of that
24 nature.

25 Why don't we take about to 2:30, let you talk to

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1 your clients and then we can do at the same time a
2 scheduling order. I can tell you some of the things I like
3 to do during discovery. We can talk about all that, okay?

4 At 2:30 we'll reconvene. Talk to your clients
5 and your experts. And I'm going to call my wife, too.
6 She'll be happy because I wanted to make a trip and she
7 didn't want to go and I think that was the time so she'll
8 be very happy.

9 Okay. We'll stand in recess.

10 (Court recessed, 2:15 p.m.)

11 - - -

12 (Court reconvened, 3:15 p.m.)

13 THE COURT: Okay.

14 MR. BROWNWELL: Your Honor, we've had some
15 discussions with everyone and we do have some conflicts
16 that first week in May with a vacation. We were wondering
17 if appropriate and your Honor would be willing if we could
18 have just a discussion in chambers about --

19 THE COURT: Come on back. Whoever is involved,
20 they are welcomed to come.

21 We'll take a short recess.

22 Also the trip I wanted to take, it's all sold
23 out.

24 Come on back.

25 (Court recessed, 3:20 p.m.)

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1 if anything else comes up don't hesitate, just put together
2 a phone conference and we'll do it.

3 Thank you, very much.

4 For those who came to spectate, thank you. It's
5 always nice -- people in the courtroom, usually you look up
6 and there's nobody out there. You watch who is going by.
7 You are always invited. Hopefully we'll see you all at the
8 trial.

9 Thank you, very much.

10 MR. BENSON: Thank you, your Honor.

11 MR. BROWNELL: Thank you.

12 (Proceedings concluded, 3:30 p.m.)

13 -- --- --

14 CERTIFICATE

15 I, JOAN L. MORGAN, Official Court Reporter for the
16 United States District Court for the Eastern District of
17 Michigan, appointed pursuant to the provisions of Title 28,
18 United States Code, Section 753, do hereby certify that the
19 foregoing proceedings were had in the within entitled and
20 number cause of the date hereinbefore set forth, and I do
21 hereby certify that the foregoing transcript has been
22 prepared by me or under my direction.

23 S:/ JOAN L. MORGAN, CSR

24 Official Court Reporter

25 February 25th, 2011 Detroit, Michigan 48226

JOAN L. MORGAN, OFFICIAL COURT REPORTER

EXHIBIT 4(A)
TO DEFENDANTS'
MEMORANDUM OF LAW
IN SUPPORT OF MOTION
FOR PROTECTIVE
ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA)	
)	
Plaintiff,)	Civil Action No. 2:10-cv-13101-BAF-RSW
and)	
)	Judge Bernard A. Friedman
NATURAL RESOURCES DEFENSE)	
COUNCIL, and SIERRA CLUB)	Magistrate Judge R. Steven Whalen
)	
Plaintiff-Intervenors)	
v.)	
)	
DTE ENERGY COMPANY, and)	
DETROIT EDISON COMPANY)	
)	
Defendants.)	
)	

PLAINTIFF UNITED STATES' FIRST SET OF INTERROGATORIES
TO DEFENDANTS DTE ENERGY AND DETROIT EDISON

Plaintiff United States of America, pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, serves the following interrogatories on Defendants DTE Energy Co. and Detroit Edison Co. The Plaintiffs request that Defendants respond to the Interrogatories set forth below within thirty (30) days of receipt, pursuant to the Federal Rules of Civil Procedure.

GENERAL INSTRUCTIONS

1. Scope of Discovery (Location and Custody of Documents and Information).

This First Set of Interrogatories ("Interrogatories") is directed to the above-named Defendants and covers all information in Defendants' possession, custody, and control, including information in the possession of Defendants' officers, employees, agents, servants, representatives, attorneys, or other persons directly or indirectly employed or retained by Defendants, or anyone else acting on Defendants' behalf or otherwise subject to their control, and any predecessors, successors, parents, subsidiaries, divisions, or affiliates.

2. Supplemental Responses. These Interrogatories impose a continuing obligation; Defendants' responses must therefore be supplemented in accordance with Fed. R. Civ. P. 26(e) if Defendants obtain additional responsive information between the date of response and the termination of any trial on the matters alleged in the Complaint.

3. Estimates. Interrogatories calling for numerical or chronological information shall be deemed, to the extent that precise figures or dates are not known, to call for estimates. In each instance that an estimate is given, it should be identified as such together with the source of information underlying the estimate.

4. Lack of Information. If you currently lack information to answer any Interrogatory completely, please state or identify:

- a. the responsive information currently available;
- b. the responsive information currently unavailable;
- c. efforts that you intend to make to secure the information currently unavailable;
and
- d. when you anticipate receiving the information currently unavailable.

5. Incomplete Response. If any Interrogatory cannot be answered fully, provide as full an answer as possible. State the reason for the inability to answer fully, and give any information, knowledge, or belief that you have regarding the unanswered portion.
6. Privilege as Applied to Interrogatory Response. Should you assert that any information requested by any of the following Interrogatories is privileged, please identify such information, state the privilege asserted, and state all facts giving rise to the assertion of such privilege.
7. Singular/Plural. Words used in the plural shall also be taken to mean and include the singular. Words used in the singular shall also be taken to mean and include the plural.
8. "And" and "Or". The words "and" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive.
9. Document Production in Lieu of Written Response. Whenever a full and complete answer to any Interrogatory or part of an Interrogatory is contained in a document or documents, the documents, if properly identified as answering a specific numbered Interrogatory or part of an Interrogatory, may be supplied in place of a written answer, provided that the specific sections or pages from the document that are responsive to the Interrogatory are identified.
10. Sources of Information. The source, sources, or derivation of each answer to the Interrogatories should be separately set forth and identified, unless the person signing the answers to these Interrogatories knows from his own personal and direct knowledge the facts or information forming the basis of each answer given.

DEFINITIONS

1. "All" or "any" means "any and all" and shall be all inclusive.
2. "Boiler" or "Boiler Unit" means a boiler system utilized to generate steam that is provided to a turbine-generator for the production of electricity and any component of such system such as the pulverizers, burners, fans, air heaters, boiler feed pumps, economizer, feedwater heaters, reheaters, superheaters, condensers, and waterwalls.
3. "Capacity Factor" means the ratio of unit generation (in megawatt hours, Mwh) to the unit's maximum generating capability (in Mwh) during the period of time which Capacity Factor is evaluated.
4. "Capital Expenditures" means expenditures by Defendants for construction projects from its capital budget.
5. "Communication" means any oral, written, mechanical, electronic, or other transmission of words, symbols, numbers, or depictions to a person, entity, file, or repository as data or information, including (but not limited to) correspondence, memoranda, or telephone conversations, or notes, recordings, transcriptions of meetings, or of telephone conversations, or any other document that recorded or reflected any such communication.
6. "Compensation" means means the following information for each of Your Witnesses, including Your Employee Witnesses: (1) Your employment contract or consulting contract with such witness; (2) Your annual salary, including any bonuses, for such witness; (3) Any payments, or any provision of items of value, to such witness, whether done on a one-time, periodic, or regular basis; (4) the total number of Your shares of stock held by such witness and the value of such shares; (5) the total number of Your stock options held by such witness and the value of such stock options; (6) the total amount of money, on an annual basis, made by such witness by selling Your stock or stock options; and (7) for any of Your current or former supervisors, managers, executive directors, or officers, describe any other compensation not otherwise listed in this definition, including, but not limited to, health care benefits, transportation services, and pension and/or retirement benefits. For current Employee Witnesses only (and *not* expert witnesses, former employees, or any other of Your Witnesses), this definition of "Compensation" is limited to current Employee Witnesses who have made \$200,000 or more in total annual compensation in at least one of the last five years.
7. "Component" means a defined portion of the Boiler, turbine, generator, or EGU. For instance, "Boiler Components" would include the following, waterwalls, first or second reheater, first or second superheater, economizer, or steam drum.
8. "Computer Model" means any program or other automated method of analysis used to project or estimate the anticipated future generation and loading of, or demand on, Defendants' generating system, including but not limited to ENPRO, PROMOD, PROSCREEN, PMOS, NUPLEX, FOPLEX, PROVIEW, PROSYM, IEES, POWERPRO, WASP, EGEAS, HYDRO LIFE CYCLE, PREPS, PEEM, CESMS, FUELWORKS, or OVER/UNDER.

9. "Consultant" means any person who has advised Defendants, or who acts or has acted as an agent on behalf of Defendants, whether or not for consideration.

10. "Contractor" or "Subcontractor" means any person who has advised Defendants, or who acts or has acted as an agent for or on behalf of Defendants, whether or not for consideration.

11. "Defendants" means either Defendant DTE Energy Co. or Defendant Detroit Edison Co., or both, and includes, without limitation, each successor, parent, subsidiary, division, and affiliate, past and present officers, employees, agents, servants, representatives, counsel, Consultants, Contractors, Subcontractors, or other Persons directly or indirectly employed by Defendants or anyone else, past or present, acting on behalf of or otherwise subject to Defendants' control.

12. "Describe" means to state each fact and opinion known to you concerning the information requested by the Interrogatory, including, but not limited to: (i) the identity of persons having knowledge of each fact or opinion relating to the information requested; (ii) the identity of each document showing or relating to the answer or any part of the answer given; (iii) all relevant dates and time periods; and (iv) all data, studies, modeling results, or other quantitative and qualitative information considered or relied upon and all calculations relating to any conclusions drawn.

13. "Document" means any and all documents as defined in Rule 34(a) of the Federal Rules of Civil Procedure, including, but not limited to, all tangible things including, without limitation, tape or other forms of audio, visual, or audio/visual recordings, written material, drawings, films, graphs, charts, photographs, phone records, and any retrievable data, whether in computer storage, carded, punched, taped, or coded form, or stored electrostatically, electromagnetically, digitally, or otherwise. Without limiting the generality of the foregoing, "document" specifically includes all contracts, agreements, forms, correspondence, letters, telegrams, telephone messages (written or audio recordings), checks, canceled checks, notices, notes, memoranda, records, reports, diaries, minutes, purchase orders, statements, worksheets, summaries, books, papers, manuals, journals, ledgers, audits, maps, diagrams, drafts, newspapers, appointment books, desk calendars, notes or summaries of personal interviews or conversations, messages (including, but not limited to reports of telephone conversations and conferences), acknowledgments, telexes, facsimiles, all other written or printed matter or communications of any kind, and all other data compilation from which information can be obtained and translated, if necessary. "Document" or "documentation" also refers to texts or treatises referred to or relied upon by Defendants' expert consultants or witnesses. Every draft or non-identical copy of a document is a separate "document" as that word is used herein.

14. "Electricity Generating Unit" or "EGU" means any electricity generating unit that relies, in whole or in part, on coal combustion to generate electricity, including the unit's Boiler and its components, fans, turbines, turbine blades, generators, emission control equipment, and other equipment related to the generation of electricity at the plant.

15. "Elements of the Project" mean individual replacements or other work performed during the Project, *i.e.*, the replacement of the pendant reheater and the generator rotor rewind are each Elements of the Project. Elements of the Project include, but are not limited to, work on each of the following components:

- a. Economizer
- b. Pendant reheater
- c. Static exciter
- d. Waterwalls
- e. Generator lead box
- f. Generator rotor
- g. Expansion joints
- h. Cables
- i. 210 Valve

16. "EPA" means the United States Environmental Protection Agency.

17. "FERC" means the Federal Energy Regulatory Commission.

18. "Generator" means the device that converts the mechanical energy from the turbine into electrical energy.

19. "Identify" or "Identification:"

a. When used with respect to an individual, means to provide such individual's name, address, telephone number, occupation or profession, job title, employer, and the name, address, and telephone number of such individual's employer.

b. When used with respect to an organization (*e.g.*, a corporation, partnership, or association), means to provide the name of the organization, type of such organization, and the address, and telephone number of its principal place of business.

c. When used with respect to a document, means to state the nature of the document (*e.g.*, letter, memorandum, telegram, etc.), the date such document was signed, prepared, sent and/or received, the identities of the sender and recipient(s) or addressee(s), and the present location and custodian of such document. In lieu of such document identification, you may produce a legible copy of the document you are asked to identify, indicating the Interrogatory to which the document is responsive or referring to the bates number or other identifying information in your answer to the Interrogatory.

d. When used with respect to a fact or facts, means, in addition to the recitation of the specific facts or facts: (1) the identification of all documents that substantiate the fact or from which the fact is drawn, and (2) the identification of any oral communication upon which your knowledge of the fact is founded, or which supports the fact, including between whom the oral communication occurred, when, and the substance of the communication.

20. "Life Extension Project" or "Life Optimization" means all activities undertaken to optimize and extend the life of, or increase the availability of, a boiler, boiler component, plant, or Electricity Generating Unit, or any combination of units or portion of a unit. This definition includes, but is not limited to: overhauls of boilers; replacements or upgrades of major boiler components; plant availability programs or projects; plant reliability programs or projects; life optimization programs or projects; life assessment evaluations; plant restoration programs or projects; and plant refurbishment programs or projects.

21. "Life Extension Studies" means all plans, evaluations, reports, and memoranda analyzing, discussing or reflecting construction activities that could be, or have been, undertaken to optimize and extend the life of, or increase the availability of, a plant, boiler, boiler component, or Electricity Generating Unit. This definition includes studies or determinations pertaining to overhauls of boiler units and replacement or upgrades of major boiler components. This definition also includes: "alternative studies;" plant availability studies, determinations, or evaluations; plant reliability studies, determinations, or evaluations; life optimization studies, determinations, or evaluations; plant life cycle analysis studies, determinations, or evaluations; plant restoration studies, determinations, or evaluations; plant modernization studies, determinations, or evaluations; life assessment studies, determinations, or evaluations; plant refurbishment studies, determinations, or evaluations; generating facility evaluations; fossil heat unit evaluation measures; and studies analyzing the need for capital expenditures to extend the useful economic life of a coal-fired boiler, unit, or plant.

22. "New Source Review" or "NSR" means Parts C and D of Title I of the Clean Air Act, 42 U.S.C. §§ 7470-7515, and the implementing federal and state regulations.

23. "Nonattainment NSR" means Part D of Title I of the Clean Air Act, 42 U.S.C. §§ 7501-7515, and its implementing federal and state regulations.

24. "Nonattainment NSR Permit" means any permit or authorization that is required by Part D of Title I of the Clean Air Act, 42 U.S.C. §§ 7501-7515, and/or the implementing federal and state regulations when a major stationary source under the applicable regulations is constructed or at which major modifications (as defined by the regulations) are to be commenced.

25. "Person" means the plural as well as the singular, and shall include without limitation, individuals, associations, partnerships, and corporations, or other form of legal entity.

26. "Pertain to," "pertaining to," "relate to," or "relating to" mean discuss, describe, refer to, reflect, contain, analyze, study, report on, comment on, evidence, comprise, constitute, set forth, consider, recommend, concern, depict, describe, or allude to.

27. "Project" means the work performed during the March to June 2010 outage at Monroe Unit 2. This definition includes, but is not limited to, activities conducted in preparation for the work during the outage, such as activities to gain access to the equipment, to alter the facilities, or prepare other components for the projects. This definition also includes, but is not limited to, follow-up activities, such as site cleanup.

28. "PSD" means Subchapter I, Part C, Prevention of Significant Deterioration of Air Quality of the Clean Air Act, 42 U.S.C. §§ 7470 - 7479, and the implementing federal and state regulations.

29. "PSD Permit" shall refer to any permit or authorization that is required pursuant to Part C, Prevention of Significant Deterioration of Air Quality of the Clean Air Act, 42 U.S.C. §§ 7470 - 7479, and/or the implementing federal and state regulations when a major stationary source under the applicable regulations is constructed or at which major modifications (as defined by the regulations) are to be commenced.

30. "State" means the State of Michigan.

31. "Unit," unless otherwise specified, shall mean Unit 2 at Defendants' Monroe Power Plant.

32. "Utilization Factor" means the ratio of the capacity factor to the equivalent availability factor.

33. "You" (and any form thereof, including "Your") means Defendants and any agent or employee of Defendants, including: (i) experts whom Defendants expect to call as witnesses at trial; (ii) attorneys retained by Defendants; and (iii) persons who have access to the requested information and from whom Defendants can obtain such information.

34. "Your Witnesses" means: (i) employee witnesses; (ii) Your other fact witnesses that may testify at the liability trial, including, but not limited to, such witnesses that You disclose in Defendants' Initial Disclosure of Fact Witnesses and Final Witness List; (iii) Your expert witnesses; and/or (iv) any other witness whatsoever that may testify on Your behalf or at Your request at the liability trial, including third-party witnesses.

INTERROGATORIES

INTERROGATORY NO. 1

Describe the physical and operational characteristics of Monroe Unit 2. In order to focus this Interrogatory, Plaintiff provides examples below of the responsive information:

- a. the type of Boiler utilized (*e.g.*, tangential fired, cyclone, etc.);
- b. the manufacturer of the Boiler;
- c. the year that the EGU first went into operation;
- d. the original construction cost of the EGU and the Boiler;
- e. the gross, net, and net "maximum dependable" MW capacity ratings of the unit, including any changes over time;
- f. the maximum steam flow or steam production capacity of the Boiler, including any changes over time;
- g. the maximum continuous rating of the Boiler (including as measured in terms of heat input or steam production), including any changes over time;
- h. the expected service life of the EGU and Boiler at the time of installation, and any changes in such expected service lives over time; and
- i. all projected or estimated retirement dates, used for any purpose, of the EGU and Boiler, and any changes in such projected or estimated retirement dates over time.

RESPONSE

INTERROGATORY NO. 2

Describe the work performed during the Project. In order to focus this Interrogatory, Plaintiffs provides the following examples of the information sought:

- a. The beginning and end dates of the outage and the beginning and end dates for each Element of the Project performed during the outage;
- b. the nature and extent of the work, including a description of what work was performed and a description of how the design and materials of added or replaced Components differ from those originally installed at the plant;
- c. a step-by-step description of how each Element of the Project was performed, including:

- (i) the work that was done in each stage of the Project;
 - (ii) who did the work;
 - (iii) the number of people it took to accomplish each task;
 - (iv) where the work took place; and
 - (v) any heavy equipment used to complete the projects.
- d. whether each Element of the Project required materials or Components from off-site or materials that were on hand at the plant;
 - e. whether, for each replacement, the entire component was replaced, and if not, which parts of the component were replaced and which parts were not replaced;
 - f. each Components' physical dimensions (length, width, and depth);
 - g. if the Component is in the Boiler, the total number of banks, assemblies, or elements; the total number of tubes; the total length of tubes; the total weight of the Component replaced; and the total weight of the new replacement Component;
 - h. the number of labor hours for the fabrication and installation of each new Component;
 - g. the service life of each component or retirement unit replaced as part of the Project as required to be utilized under the Federal Energy Regulatory Commission's Uniform System of Accounts; and
 - h. The total cost of the Project and of each Element of the Project.

RESPONSE

INTERROGATORY NO. 3

Describe the scope of all capitalized waterwall replacements since January 1, 2000 at Monroe Unit 2. Include in your description the date of each replacement, the approximate proportion of the total waterwalls replaced, the location of the waterwalls that were replaced, any difference in the tube materials replaced versus the new tube materials, the purpose of the replacement, the reason for replacement, the cost of the replacement (including the cost of materials and labor), and whether the replacement was part of any larger effort to replace all or a

significant portion the waterwalls at Monroe Unit 2 over multiple outages.

RESPONSE

INTERROGATORY NO. 4

Describe the role each of Defendants' employees and URS played with respect to the planning, approval, or implementation of the Project. For each employee with a substantive role, provide the employee's name, employer, title, and a description of his or her work and responsibilities with respect to the Project. This Interrogatory specifically includes URS and the following employees, but is not limited to them:

RC Larlham	Jerry Brake	Lillian Wooley
Joe Robinson	R. Fenech	Clare Jennings
Randy DeWulf	Chris Essex	Paul Fessler
Leonard Kantoca	William Dugliss	Skiles Boyd
Christopher Hessex	Elaine Harrison	Anthony Early
Franklin Warren	Lauwrence Powers	
Phil Hinz	David Roy	

RESPONSE

INTERROGATORY NO. 5

Describe the purpose(s) of the Project, and Defendants' justifications for undertaking each Element of the Project. In order to focus this Interrogatory, Plaintiffs provides the following examples of the information sought:

- a. the purpose(s) of each Element of the Project;
- b. the economic and technical justification(s) for each Element of the Project;
- c. the generating capacity (*MW*) that was expected to be added, recovered, restored, or otherwise increased as a result of each Element of the Project and/or the Project as a whole;
- d. the unit availability that was expected to be added, recovered, restored, or otherwise increased as a result of each Element of the Project and/or the Project as a whole;

- e. the electricity generation (*MWhr*) that was expected to be added, recovered, restored, or otherwise increased as a result of each Element of the Project and/or the Project as a whole;
- f. the steam production that was expected to be added, recovered, restored, or otherwise increased as a result of each Element of the Project and/or the Project as a whole;
- g. the amount by which the maximum actual, potential, or permitted boiler heat input was expected to be increased as a result of each Element of the Project and/or the Project as a whole;
- h. the fan (*e.g.*, induced and forced draft fans and all components thereof) capacity that was expected to be added, recovered, restored, or otherwise increased as a result of each Element of the Project and/or the Project as a whole;
- i. all deratings, if any, during the five years prior to the Project for reasons related to each Element of the Project;
- j. all forced outages, if any, during the five years prior to the Project for reasons related to each Element of the Project;
- k. whether any Element of the Project and/or the Project as a whole was intended to extend the life of the EGU, and if so, the projected or estimated number of years that the work performed was anticipated by Defendants to add to the useful life of the subject EGU;
- l. whether any Element of the Project and/or the Project as a whole was intended to change, or resulted in a change in, the dispatch order of the EGUs or made the EGUs more economical to run compared to other of Defendants' units;
- m. the circumstances under which the EGU would have continued to run if the Project had not been performed, including any operational limitations. For example, would forced outages generally have kept the EGU off-line longer than if the Project had not been not done? Would the EGU have been derated?; and
- n. whether the Project was intended to allow the EGU to operate at lower or higher loads, produce more steam for sale or use, improve start-up times, run more efficiently as a peaking, cycling, base-load unit, or cogeneration unit, or otherwise change the operation of the subject EGU in any way.

RESPONSE

INTERROGATORY NO. 6

Describe how Defendants evaluated the success of each Element of the Project and the Project as a whole in terms of the subject EGU's performance and operational characteristics. Include in Your response the Identification of each Document in which the information is found and each person with knowledge of the information.

RESPONSE

INTERROGATORY NO. 7

Describe the Project's effect on dispatch. Include in Your response the following information, and Identify each Document in which the information is found and each person with knowledge of the information:

- a. whether the dispatch order of Monroe Unit 2 was changed after the completion of the Project (regardless of whether the change was a result of the Project) and if so, how?; and
- b. whether the Project allowed Monroe Unit 2 to operate at lower or higher loads, produce more steam for sale or use, improve start-up times, run more efficiently, or otherwise change the operation of the Unit in any way.

RESPONSE

INTERROGATORY NO. 8

Describe the planning, authorization, and approval process performed for the Project. Include in Your response the following information, and Identify each document in which the information is found and each person with knowledge of the information:

- a. a description of the planning and approval process that occurred prior to the Project and through the completion of the Project;
- b. the approximate beginning and ending dates of the time period during which the planning and approval took place, and the date that Defendants made the decision to proceed with each Element of the Project;
- c. each office, department, or group that was involved in planning, designing, engineering, budgeting, securing approval, managing, or supervising the Elements of the Project. For each such office, describe its role in each Element of the Project;
- d. the role, if any, of the Boiler Tube Failure Reduction team in identifying potential Elements of the Project and the nature of the team's analysis and recommendations;
- e. the names, titles, employers, and affiliation of each person involved in planning,

- approval, and performing the Project, and each such person's role in planning, approval, and performing the Project, including designing, engineering, budgeting, securing approval, managing, or supervising the Project;
- f. the name, title, and employer of the person(s) with approval authority for each Element of the Project, and the maximum dollar amount of authority for each such person or office;
 - g. the procedures for securing authorization or approval for each Element of the Project from Defendants' management, members, and/or board of directors;
 - h. If Defendants sought credit from any lending institution or raised money by a bond issue relating to the Project, Identify all related Documents, the name, title, and employer of the person(s) who sought such credit, and whether such credit was granted.

RESPONSE

INTERROGATORY NO. 9

Describe any efforts Defendants have taken to avoid triggering NSR for any coal-fired generating unit since January 1, 1980. Potential examples of such efforts include, internal administrative emissions limits, synthetic minor permits, netting out of emissions increases, etc. *See also* Doc. # 46-3 (Declaration of Colin Campbell). Include in your response how any such practices are implemented, any changes in Defendants' approach over time to any potential methods of avoiding NSR, and the individuals responsible for implementing any policies on methods of avoiding NSR and/or the application of those policies to particular situations. This Interrogatory specifically includes, but is not limited to, Defendants' response to and practices for complying with EPA's May 23, 2000 Applicability Determination issued to Detroit Edison.

RESPONSE

INTERROGATORY NO. 10

Identify each prior instance in which Defendants replaced an entire Boiler Component (*i.e.*, economizer, first or second reheater, first or second superheater, or waterwalls) at any coal-fired generating unit. For each instance, provide the unit, the date of the replacement, the Component replaced, the purpose of the replacement, any differences in the materials used in the original and replacement Component, the number of years the Component was in service, and the cost of the replacement.

RESPONSE

INTERROGATORY NO. 11

Describe any information or data gathered prior to the Project relating to how many projects of similar nature and/or projects similar to the Boiler Component replacements in the Project had been performed at any EGU or coal-fired boiler in the electric utility industry (*e.g.*, was any information or data gathered relating to the number of reheaters replaced, etc.). Include in Your response the Identification of each document in which the information is found and each person with knowledge of the information.

RESPONSE

INTERROGATORY NO. 12

Describe any NSR calculations done related to the Project, including any emission calculations done to establish pre-project baseline emissions, any emission calculations done to predict or forecast net representative actual emissions after the Project was to be completed, and any emissions calculations done for the purpose of netting as set forth in 40 C.F.R. § 52.21(b)(3)(i)(b) or any analogous state provision. In Your response, Identify each Document in which such calculations are found and each person involved in each such calculation. If any such person is not currently employed by the Defendant, then identify such person's last known address and phone number.

RESPONSE

INTERROGATORY NO. 13

If You contend that (i) the Project did not result in a significant net emissions increase of nitrogen oxides (NO_x) or sulfur dioxide (SO₂), as defined by 40 C.F.R. §§ 52.21(b)(3), (b)(21), and (b)(23) or any analogous state provision; (ii) any emissions increase is unrelated to the project; (iii) part or all of any emissions increase can be excluded pursuant to 40 C.F.R. § 52.21(b)(41)(ii)(c) or any analogous state provision; or (iv) the Project does not otherwise trigger New Source Review due to a lack of a relevant emissions increase under the law, then provide the basis for Your position and all supporting calculations. In Your response, Identify all Documents that support Your position and the name, title, employer, and office of every person involved in each such calculation or assertion. If any such person is not currently employed by the Defendant, then identify such person's last known address and phone number.

RESPONSE

INTERROGATORY NO. 14

If You contend that the Project constituted routine maintenance, repair and replacement within the meaning of PSD or Nonattainment NSR, Describe the reasons for your contention. Include in Your response the date on which any such determination was made, and Identify every Document You relied upon to make any such determination and the name, title, employer, and office of each person involved in making each such determination.

RESPONSE

INTERROGATORY NO. 15

If You contend that the Project was not a "modification" or "major modification" within the meaning of PSD or Nonattainment NSR, Describe the reasons that You contend that the Project did not constitute a "modification" or "major modification" under the Clean Air Act or its implementing regulations. Include in Your response the date on which any such determination was made, and Identify every Document You relied upon to make any such determination and the name, title, employer, and office of each person involved in making each such determination.

RESPONSE

INTERROGATORY NO. 16

If You contend, for any reason not already set forth in Your responses to Interrogatories 13-15, that the Project is not a violation of NSR or that Defendants Detroit Edison Co. and DTE Energy Co. are not liable for such violation, Describe all reasons for your contention. Identify every Document You relied upon to make any such determination and the name, title, employer, and office of each person with knowledge supporting Your contention.

RESPONSE

INTERROGATORY NO. 17

Identify the pre-project baseline period(s) that You contend should be used in calculating any SO₂ or NO_x emissions increase caused by the Project for purposes of determining NSR applicability. Provide the baseline SO₂ and NO_x amount, including how You calculated the SO₂ and NO_x amount, where you obtained the data, and whether the data has been reported to any government or third party entity. For any baseline period you propose, also provide the generation in MWhrs, the capacity factor, the SO₂ and NO_x emissions rate, and the heat input and Describe how You developed each figure.

RESPONSE

INTERROGATORY NO. 18

Describe all evaluations, analyses, assessments, reports, investigations, meetings and Communications (together "Evaluations" for purposes of this Interrogatory) performed prior to the filing of the United States' Complaint in this matter regarding whether the Project triggered or may trigger NSR review. Include in Your response:

- a. the identification and contents of all documents associated with such Evaluations;
- b. the identification of all individuals participating in such Evaluations and a complete description of their role in the Evaluations;
- c. the date and location of any meetings at which discussion of such Evaluations occurred and the Identification of each person present;
- d. the results of the Evaluations; and
- e. all information considered as part of the Evaluations, including but not limited to information from state or federal regulatory agencies.

RESPONSE

INTERROGATORY NO. 19

Identify each person who has had any responsibility relating to the development of fuel budgets, fuel use estimates, fuel prices, dispatch costs, generation estimates, steam production estimates, and market prices for electricity generated by Defendants' power plants from 2005 to the present. This specifically includes individuals who have such responsibilities relating to the development of inputs to any Computer Model and for use in any filing before the Michigan Public Service Commission. For each person identified, provide: the job title and employer of the person; the specific responsibilities of such person for the activity identified; the time period during which the person had such responsibilities; whether the person is currently employed by Defendants; and the last known home address of any person identified who is not employed by Defendants.

RESPONSE

INTERROGATORY NO. 20

Identify each person who has had any responsibility relating to the projection or estimation of the potential effect on emissions, EGU availability, EGU generating capacity, EGU heat rate, steam production capacity, EGU fuel burning capacity, EGU heat input capacity, opacity, or hourly, monthly or annual generation for Monroe Unit 2 from 2005 to the present. This specifically includes individuals who have such responsibilities relating to the development of inputs to any Computer Model and for use in any filing before the Michigan Public Service Commission. For each person identified, provide: the job title and employer of the person; the

specific responsibilities of such person for the activity identified; the time period during which the person had such responsibilities; whether the person is currently employed by Defendants; and the last known home address of any person identified who is not employed by Defendants.

RESPONSE

INTERROGATORY NO. 21

Identify all computer modeling programs used by Defendants during the period January 1, 2005 through the present for: (a) analyzing the future generation and loading, or demand on, Defendants' coal-fired generating units; (b) resource planning; (c) fuel budgets; (d) preparation of any filing with federal or state regulatory agencies; (e) emissions allowances or emissions rates; and/or (f) projecting the generation, availability, and/or utilization of Defendants' generating units (including dispatch order). These computer modeling programs would include, but not be limited to any Computer Model, as well as all computer modeling programs developed or utilized for the following purposes:

- a. forecasting fuel quality, use, and procurement requirements for the EGUs;
- b. analyzing the economic or technical operating lives of any of the EGUs;
- c. analyzing the economic costs and/or benefits of individual equipment repairs, replacements, or improvement projects at any of the EGUs;
- d. analyzing the impact of individual equipment repair, replacement, or improvement projects at any of the EGUs on: (i) the power level; (ii) operating performance; (iii) energy output; (iv) availability and/or utilization; (v) recovery of the investment; or (vi) air emissions; and
- e. forecasting the amount of generation and/or air emissions from the EGUs for purposes of planning capital investments in equipment maintenance, repair, or replacement of, or additions to, the EGUs.

RESPONSE

INTERROGATORY NO. 22

For each computer modeling program that You Identified in Interrogatory No. 21, above, identify each analysis or modeling run performed by Defendants or on their behalf, including the following information

- a. the date of each run;
- b. the purposes of each run;
- c. the version of the computer modeling program used;
- d. how each computer modeling program was used to evaluate the costs, benefits, and consequences of undertaking, delaying, or not undertaking any construction project. This Interrogatory specifically includes, but is not limited to, life extension analyses and retirement studies, and any other evaluation of proposed

- projects using any of the computer modeling programs used by Defendants to determine the appropriateness and value of any addition or change to any EGU;
- e. the individuals responsible for running the computer modeling program, including any Consultants or Contractors, and for collecting the data used in each run of the computer modeling program.
 - f. The inputs and outputs for each run (this Interrogatory seeks the names of the inputs and outputs rather than the numerical values); and
 - g. the format of all input files and output runs (e.g., are these files stored as text files or digitally).

RESPONSE

INTERROGATORY NO. 23

Identify each factor (e.g., cost of coal) that You contend may affect the amount of generation from Monroe Unit 2.

RESPONSE

INTERROGATORY NO. 24

If You relied upon any Communication from EPA or any state agency to determine whether any of the Projects, respectively, were a "major modification" within the meaning of PSD, identify each and every such Communication, the date on which the Communication occurred, the date on which You first became aware of the content of the Communication, the identity of each document in which this information is found, and the identify of each person with knowledge about the information.

RESPONSE

INTERROGATORY NO. 25

Identify all persons, including but not limited to Defendants' current or former directors, officers, employees, former employees, Consultants, Contractors, Subcontractors or employees of any parent or subsidiary entities of Defendants, who, from January 1, 2000 to the present, were responsible for ensuring that Defendant achieved and maintained compliance with PSD or Nonattainment NSR. For each person identified, Describe their role with respect to NSR compliance.

RESPONSE

INTERROGATORY NO. 26

Identify and Describe all electronic databases maintained by Defendants at any time since 2005 relating to accounting, maintenance, performance, operations, capital projects, generation, SO₂ and NO_x emissions, environmental compliance, or fuel use for Defendants' coal-fired generating units including Monroe Unit 2. Include in Your response:

- a. the name(s) of the database(s);
- b. a listing of all fields in each database;
- c. a description of each field and the data inputted into that field;
- d. a description and examples of all standard reports;
- e. any changes in the structure of each database over time;
- f. the time period covered by the data in each database;
- g. the time period during which each database was used by ComEd or Defendant;
- h. the purposes for which each database was used by ComEd or Defendant; and

RESPONSE

INTERROGATORY NO. 27

Explain and Describe how expensed and capitalized portions of a project are handled in Defendants' accounting system, including an explanation of:

- a. how the current accounting system distinguishes between expensed and capitalized portions of a project and how such distinctions have been made in any accounting system used in the past;
- b. whether or not expensed and capitalized portions of a project are assigned the same or different identification numbers;
- c. how Defendants distinguish between expensed and capitalized portions of a project; and
- d. any further accounting subdivisions to distinguish between various types of construction, capital improvement, repair, and maintenance costs.

RESPONSE

INTERROGATORY NO. 28

From 2005 to the date of this Interrogatory, state the name, present or last known business and residence address, telephone number, job title, employer, and dates of employment with Defendants, of the following current and former employees who performed work at or relating to the Monroe Power Plant

- a. plant managers;
- b. plant engineering managers;
- c. plant maintenance superintendents, managers, and supervisors;
- d. plant maintenance engineers;
- e. plant maintenance specialists;

- f. project managers;
- g. construction managers and superintendents;
- h. power production managers;
- i. environmental affairs managers;
- j. any person or office responsible for analyzing, conducting, or evaluating life extension projects or studies or similar programs.

Include in Your response the information requested for all positions similar or equivalent to those listed above.

RESPONSE

INTERROGATORY NO. 29

Describe Your Compensation of each of Your Witnesses, including, but not limited to, identifying any Documents relating to such Compensation. The request is limited to January 1, 2000 forward; however, for current Employee Witnesses, this request is limited to documents from January 1, 2007 forward.

RESPONSE

INTERROGATORY NO. 30

For each of Your Witnesses, state with specificity the subject matter(s) of the witness's anticipated testimony, and the facts, Documents, and Communications that support or relate to the witness's anticipated testimony.

RESPONSE

INTERROGATORY NO. 31

For each Employee Witness that may offer expert opinions within the scope of Federal Rule of Evidence 702, state all opinions the witness will express and the bases and reasons for the opinions, state the data or other information considered by the witness in forming the opinions, detail the witness's qualifications, including a list of all publications authored, and provide a list of all other proceedings in which the witness has testified as an expert, including at a trial, at a hearing of any kind, or by deposition, and state the witnesses' job title(s), employer, and areas of responsibility since the witness began working for Defendants (including identifying any Documents that describe the witnesses' job duties).

RESPONSE

INTERROGATORY NO. 32

For each of Your Witnesses, including Employee Witnesses, that may offer lay opinions within the scope of Federal Rule of Evidence 701, state all opinions the witness will express and the bases and reasons for the opinions, state the data or other information considered by the witness in forming such opinions and facts, identify the Documents and Communications that support or relate to the witnesses' opinions, and state the witnesses' job title(s), employer, and areas of responsibility since the witness began working for the Defendant (including identifying any Documents that describe the witnesses' job duties).

RESPONSE

INTERROGATORY NO. 33

Identify all articles, publications, or presentations ("public statements") that Your Witnesses have authored, co-authored, presented, or co-presented, provided that such public statements concern the subject matter(s) of Your Witnesses' testimony in this matter. For purposes of this Interrogatory, "presentations" mean PowerPoint slides, handouts, and other written materials that Your Witness reviewed, provided to, or showed an audience while lecturing or speaking.

RESPONSE

INTERROGATORY NO. 34

Identify all other Documents that Your Witnesses have authored, co-authored, presented, or co-presented, provided that such Documents concern the subject matter(s) of Your Witnesses' testimony in this matter. For purposes of this request, "presentations" mean PowerPoint slides, handouts, and other written materials that Your Witness reviewed, and/or provided to, or showed, an audience with lecturing or speaking.

RESPONSE

INTERROGATORY NO. 35

Identify the author(s) and the recipient(s) of the following documents:

- a. Fossil Generation PAT Review Request Forms and Appropriation Request Summary Sheets for each Element of the Project (examples of these documents are Ex. 2-F to the United States' preliminary injunction motion);
- b. Powerpoint presentations related to replacing any Component replaced during the Project (examples are Exs. 13-E and 13-F to the United States' reply brief in support of the preliminary injunction motion);
- c. Documents with the title Executive Summary for each Element of the Project (example previously produced by Defendants at EPA 5-24-10 Q9 M0002560)
- d. Documents with the title Fos Gen Large Capital Projects for each Element of the Project (example previously produced by Defendants at EPA 5-24-10 Q9 M0002563); and
- e. Table 1 to Defendants' March 12, 2010 letter to William Presson, Michigan Department of Environmental Quality (Ex. 2-C to the United States' preliminary injunction motion).

RESPONSE

INTERROGATORY NO. 36

For each year beginning January 1, 2000 through the present, provide the total amount of:
(i) Defendants' annual maintenance spending for the coal-fired generating fleet as a whole and
and for each individual coal-fired generating unit; and (ii) Defendants' annual capital spending
for the coal-fired generating fleet as a whole and each individual coal-fired generating unit.

RESPONSE

Respectfully Submitted,

Dated: January 28, 2011

OF COUNSEL:
SABRINA ARGENTIERI
MARK PALERMO
SUSAN PROUT
Associate Regional Counsel
U.S. EPA Region 5
Chicago, IL
177 W. Jackson Blvd.

APPLE CHAPMAN
Attorney Advisor
U.S. EPA
1200 Pennsylvania Ave. NW
Washington D.C. 20460

IGNACIA S. MORENO
Assistant Attorney General
Environment & Natural Resources Division

/s/ Thomas A. Benson
JUSTIN A. SAVAGE
Senior Counsel
THOMAS A. BENSON (MA Bar # 660308)
KRISTIN M. FURRIE
Trial Attorneys
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
(202) 616-6515
kristin.furrie@usdoj.gov

BARBARA McQUADE
United States Attorney
Eastern District of Michigan

ELLEN CHRISTENSEN
Assistant United States Attorney
211 W. Fort St., Suite 2001
Detroit, MI 482266

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2011, the foregoing discovery requests were served via email on counsel of record.

s/ Thomas A. Benson

Counsel for the United States

EXHIBIT 4(B)
TO DEFENDANTS'
MEMORANDUM OF LAW
IN SUPPORT OF MOTION
FOR PROTECTIVE
ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA)	
)	
Plaintiff,)	Civil Action No. 2:10-cv-13101-BAF-RSW
and)	
)	Judge Bernard A. Friedman
NATURAL RESOURCES DEFENSE)	
COUNCIL, and SIERRA CLUB)	Magistrate Judge R. Steven Whalen
)	
Plaintiff-Intervenors)	
v.)	
)	
DTE ENERGY COMPANY, and)	
DETROIT EDISON COMPANY)	
)	
Defendants.)	
<hr/>		

PLAINTIFF UNITED STATES' FIRST SET OF DOCUMENT REQUESTS
TO DEFENDANTS DTE ENERGY AND DETROIT EDISON

Plaintiff United States, pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, requests that Defendants DTE Energy Co. and Detroit Edison Co. produce any written responses and the documents responsive to the requests described below within 30 days after receipt at the United States Department of Justice, Environment and Natural Resources Division, Environmental Enforcement Section, 601 D St. NW, Washington, DC 20004, or at some other location agreed upon by counsel.

GENERAL INSTRUCTIONS

1. Scope of Discovery (Location and Custody of Documents and Information). This First Set of Requests for Production ("Requests") is directed to the above-named Defendants and covers all information in Defendants' possession, custody, and control, including information in the possession of Defendants' officers, employees, agents, servants, representatives, attorneys, or other Persons directly or indirectly employed or retained by it, or anyone else acting on Defendants' behalf or otherwise subject to its control, and any successor, parent, subsidiary, division, or affiliate.

2. Time Period. Unless otherwise indicated, these Requests apply to the time period from January 1, 2005 through the date upon which production occurs (including any supplementation as required below).

3. Supplemental Responses. These Requests impose a continuing obligation; Defendants' responses must therefore be supplemented in accordance with Fed. R. Civ. P. 26(e) if Defendants obtain additional Documents between the date of production and the termination of any trial on the matters alleged in the Complaint.

4. Documents Previously Provided. Defendants need not reproduce any Document that they previously produced pursuant to an EPA request for information under Section 114 of the Clean Air Act, 42 U.S.C. § 7414, provided that Defendant specifically identifies those previously produced Documents responsive to a particular Request, *e.g.*, identify the Bates number and Document title in Defendants' written responses to a specific Request.

5. Privilege as Applied to Document Production. If, on the basis of any claim of privilege, Defendants object to producing any Document or any portion thereof, or to disclosing any information contained therein, in response to any Request, then Defendants are requested to

specify in writing the nature of such information and Documents and the nature of the privilege claimed, so that the Court may rule on the propriety of the objection. Specifically, Defendants should identify:

- a. the title of the Document;
 - b. the nature of the Document (*e.g.*, inter-office memorandum, correspondence, report);
 - c. the author or sender;
 - d. the addressee(s);
 - e. the date of the Document;
 - f. the name of each Person to whom the original or a copy was shown or circulated;
 - g. the names appearing on any circulation list relating to the Document;
 - h. the basis on which privilege is claimed; and
 - i. a summary of the Document's subject matter which provides sufficient detail to permit the Court to rule on the propriety of the objection.
6. Singular/Plural. Words used in the plural shall also be taken to mean and include the singular. Words used in the singular shall also be taken to mean and include the plural.
7. "And" and "Or". The words "and" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive.
8. Document No Longer in Possession. If any Document requested is no longer in the possession, custody, or control of Defendants, state:
- a. what was done with the Document;
 - b. when such Document was made;
 - c. when the Document left Defendants' possession, custody, or control;

- d. the identity and address of the current custodian of the Document;
- e. the Person who made the decision to transfer or dispose of the Document; and
- f. the reasons for the transfer or disposition.

9. Deletions from Documents. Where anything has been deleted from a Document produced in response to a production request:

- a. specify the nature of the material deleted;
- b. specify the reason for the deletion;
- c. when the deletion was made; and
- d. identify the Person responsible for the deletion.

10. Sources of Documents. In responding to each Request, every source of Documents to which Defendants have access should be consulted, regardless of whether the source is within Defendant's immediate possession or control. All Documents in the possession of experts or Consultants must be consulted.

11. Electronic Documents. Each Request below applies to all electronic Documents. For any Documents kept electronically by Defendants, produce the Documents in their native electronic format (*i.e.*, as a Microsoft Excel file rather than a printed Document or .pdf file).

12. Inability to Respond. Whenever Defendants are unable to produce Documents in response to a Request, state the steps taken to locate responsive Documents.

13. Retention of Documents. Defendants are to retain in their possession, custody, or control, and to refrain from destroying, any Document requested herein that is in Defendants' possession, custody, or control as of the date of service of these Requests.

DEFINITIONS

1. "All" or "any" means "any and all" and shall be all inclusive.
2. "Boiler" or "Boiler Unit" means a boiler system utilized to generate steam that is provided to a turbine-generator for the production of electricity and any component of such system such as the pulverizers, burners, fans, air heaters, boiler feed pumps, economizer, feedwater heaters, reheaters, superheaters, condensers, and waterwalls.
3. "Capacity Factor" means the ratio of unit generation (in megawatt hours, Mwh) to the unit's maximum generating capability (in Mwh) during the period of time which Capacity Factor is evaluated.
4. "Capital Expenditures" means expenditures by Defendants for construction projects from its capital budget.
5. "Coal Data" means all contemporaneously developed documentation, data compilation, and reports to regulatory authorities that contain or reflect coal usage and purchase information, including all reports indicating monthly, daily, and hourly coal usage/consumption and coal analysis data (including heat content and sulfur, ash, and moisture content (percent by weight)). This Request includes, but is not limited to, any monthly operating reports or similar reports that would contain such data.
6. "Communication" means any oral, written, mechanical, electronic, or other transmission of words, symbols, numbers, or depictions to a person, entity, file, or repository as data or information, including (but not limited to) correspondence, memoranda, or telephone conversations, or notes, recordings, transcriptions of meetings, or of telephone conversations, or any other document that recorded or reflected any such communication.
7. "Component" means a defined portion of the Boiler, turbine, generator, or EGU. For instance, "Boiler Components" would include the following, waterwalls, first or second reheater, first or second superheater, economizer, or steam drum.
8. "Computer Model" means any program or other automated method of analysis used to project or estimate the anticipated future generation and loading of, or demand on, Defendants' generating system, including but not limited to AWARE, ENPRO, PROMOD, PROSCREEN, PMOS, NUPLEX, FOPLEX, PROVIEW, PROSYM, IEES, POWERPRO, WASP, EGEAS, HYDRO LIFE CYCLE, PREPS, PEEM, CESMS, FUELWORKS, or OVER/UNDER.
9. "Consultant" means any person who has advised Defendants, or who acts or has acted as an agent on behalf of Defendants, whether or not for consideration.
10. "Contractor" or "Subcontractor" means any person who has advised Defendant, or who acts or has acted as an agent for or on behalf of Defendant, whether or not for consideration.

11. "Defendants" means either Defendant DTE Energy Co. or Defendant Detroit Edison Co., or both, and includes, without limitation, each successor, parent, subsidiary, division, and affiliate, past and present officers, employees, agents, servants, representatives, counsel, Consultants, Contractors, Subcontractors, or other Persons directly or indirectly employed by Defendants or anyone else, past or present, acting on behalf of or otherwise subject to Defendants' control.

12. "Depiction" means all pictures, blueprints, as-built drawings, photographs, diagrams, and Boiler cross-sectional diagrams.

13. "Document" means any and all documents as defined in Rule 34(a) of the Federal Rules of Civil Procedure, including, but not limited to, all tangible things including, without limitation, tape or other forms of audio, visual, or audio/visual recordings, written material, drawings, films, graphs, charts, photographs, phone records, and any retrievable data, whether in computer storage, carded, punched, taped, or coded form, or stored electrostatically, electromagnetically, digitally, or otherwise. Without limiting the generality of the foregoing, "document" specifically includes all contracts, agreements, forms, correspondence, letters, telegrams, telephone messages (written or audio recordings), checks, canceled checks, notices, notes, memoranda, records, reports, diaries, minutes, purchase orders, statements, worksheets, summaries, books, papers, manuals, journals, ledgers, audits, maps, diagrams, drafts, newspapers, appointment books, desk calendars, notes or summaries of personal interviews or conversations, messages (including, but not limited to reports of telephone conversations and conferences), acknowledgments, telexes, facsimiles, all other written or printed matter or communications of any kind, and all other data compilation from which information can be obtained and translated, if necessary. "Document" or "documentation" also refers to texts or treatises referred to or relied upon by Defendants' expert consultants or witnesses. Every draft or non-identical copy of a document is a separate "document" as that word is used herein.

14. "Electricity Generating Unit," "EGU," or "Unit," means any electricity generating unit that relies, in whole or in part, on coal combustion to generate electricity, including the unit's Boiler and its components, fans, turbines, turbine blades, generators, emission control equipment, and other equipment related to the generation of electricity at the plant.

15. "Elements of the Project" mean individual replacements or other work performed during the Project, *i.e.*, the replacement of the pendant reheater and the generator rotor rewind are each Elements of the Project. Elements of the Project include, but are not limited to, work on each of the following components:

- a. Economizer
- b. Pendant reheater
- c. Static exciter
- d. Waterwalls

- e. Generator lead box
- f. Generator rotor
- g. Expansion joints
- h. Cables
- i. 210 Valve

16. "EPA" means the United States Environmental Protection Agency.

17. "FERC" means the Federal Energy Regulatory Commission.

18. "Forecasts" means Defendants' system forecasts, including unit-specific information if available, regarding load predictions, system demand, megawatt production, Capacity Factor, availability, forced outage rates, coal characteristics, coal use, emissions, and/or heat input. Forecasts include Documents relating to assumptions underlying each forecast (*e.g.*, unit emissions factors, unit heat rates, unit generating capacity, production cost, emissions allowance cost, unit availability factors such as EAF, coal sulfur content, and system-wide demand growth).

19. "Generator" means the device that converts the mechanical energy from the turbine into electrical energy.

20. "Life Extension Project" or "Life Optimization" means all activities undertaken to optimize and extend the life of, or increase the availability of, a boiler, boiler component, plant, or Electricity Generating Unit, or any combination of units or portion of a unit. This definition includes, but is not limited to: overhauls of boilers; replacements or upgrades of major boiler components; plant availability programs or projects; plant reliability programs or projects; life optimization programs or projects; life assessment evaluations; plant restoration programs or projects; and plant refurbishment programs or projects.

21. "Life Extension Studies" means all plans, evaluations, reports, and memoranda analyzing, discussing or reflecting construction activities that could be, or have been, undertaken to optimize and extend the life of, or increase the availability of, a plant, boiler, boiler component, or Electricity Generating Unit. This definition includes studies or determinations pertaining to overhauls of boiler units and replacement or upgrades of major boiler components. This definition also includes: "alternative studies;" plant availability studies, determinations, or evaluations; plant reliability studies, determinations, or evaluations; life optimization studies, determinations, or evaluations; plant life cycle analysis studies, determinations, or evaluations; plant restoration studies, determinations, or evaluations; plant modernization studies, determinations, or evaluations; life assessment studies, determinations, or evaluations; plant refurbishment studies, determinations, or evaluations; generating facility evaluations; fossil heat

unit evaluation measures; and studies analyzing the need for capital expenditures to extend the useful economic life of a coal-fired boiler, unit, or plant.

22. "New Source Review" or "NSR" means Parts C and D of Title I of the Clean Air Act, 42 U.S.C. §§ 7470-7515, and the implementing federal and state regulations.

23. "Nonattainment NSR" means Part D of Title I of the Clean Air Act, 42 U.S.C. §§ 7501-7515, and its implementing federal and state regulations.

24. "Nonattainment NSR Permit" means any permit or authorization that is required by Part D of Title I of the Clean Air Act, 42 U.S.C. §§ 7501-7515, and/or the implementing federal and state regulations when a major stationary source under the applicable regulations is constructed or at which major modifications (as defined by the regulations) are to be commenced.

25. "Person" means the plural as well as the singular, and shall include without limitation, individuals, associations, partnerships, and corporations, or other form of legal entity.

26. "Pertain to," "pertaining to," "relate to," or "relating to" mean discuss, describe, refer to, reflect, contain, analyze, study, report on, comment on, evidence, comprise, constitute, set forth, consider, recommend, concern, depict, describe, or allude to.

27. "Project" means the work performed during the March to June 2010 outage at Monroe Unit 2. This definition includes, but is not limited to, activities conducted in preparation for the work during the outage, such as activities to gain access to the equipment, to alter the facilities, or prepare other components for the projects. This definition also includes, but is not limited to, follow-up activities, such as site cleanup.

28. "Project Documents" means all project justifications, contracts, cost-benefit analyses, Life Extension Studies, alternative options analyses, solicitations for bids, correspondence, internal memoranda or email, newsletters, proposals, notes from any source, estimates, equipment specifications, invoices, payments, purchase orders, labor costs, funding requests, work orders, approval documents, briefings, submissions to the Michigan Public Service Commission or FERC, project completion reports, proposed and executed contracts, progress reports, morning reports, outage reports, operator logs, performance tests, construction schedules, project completion reports, and minutes from corporate meetings, that relate to the Project. This includes Documents that describe or relate to differences in the operational characteristics, material, design configuration, type of components, or other type of differences in the design or performance capability between any original and replacement components.

29. "PSD" means Subchapter I, Part C, Prevention of Significant Deterioration of Air Quality of the Clean Air Act, 42 U.S.C. §§ 7470 - 7479, and the implementing federal and state regulations.

30. "PSD Permit" shall refer to any permit or authorization that is required pursuant to Part C, Prevention of Significant Deterioration of Air Quality of the Clean Air Act, 42 U.S.C. §§ 7470 - 7479, and/or the implementing federal and state regulations when a major stationary source under the applicable regulations is constructed or at which major modifications (as defined by the regulations) are to be commenced.

31. "State" means the State of Michigan.

32. "Utilization Factor" means the ratio of the capacity factor to the equivalent availability factor.

33. "You" (and any form thereof, including "Your") means Defendants and any agent or employee of Defendants, including: (i) experts whom Defendants may call as witnesses at trial; (ii) attorneys retained by Defendants; and (iii) persons who have access to the requested information and from whom Defendants can obtain such information.

34. "Your Witnesses" means: (i) employee witnesses; (ii) Your other fact witnesses that may testify at the liability trial, including, but not limited to, such witnesses that You disclose in Defendant's Initial Disclosure of Fact Witnesses and Final Witness List; (iii) Your expert witnesses; and/or (iv) any other witness whatsoever that may testify on Your behalf or at Your request at the liability trial, including third-party witnesses.

REQUESTS FOR PRODUCTION OF DOCUMENTS

1. Produce all Depictions sufficient to accurately depict or illustrate the physical layout of the Boiler Unit and EGU, including the associated turbine and generator, for Monroe Unit 2 before and after the Project, including one or more current Depictions that depict, or are sufficient to establish, the physical dimensions of the real property owned by Defendants and the coal pile and coal transportation methods.
2. Produce all Forecasts, whether prepared by Defendants or a third party, covering periods including January 1, 2005 through December 31, 2015 for the Unit.
3. Produce all Project Documents.
4. Produce all Documents reflecting any internal or external Communications regarding the potential or expected effect on emissions or Unit operation attributable to the Project.
5. Produce all Coal Data for Monroe Unit 2, or, if the data is maintained for the Monroe Power Plant as a whole, the entire Monroe Power Plant.
6. For the period from January 1, 2000 to the present, produce all Documents related to or discussing the meaning, interpretation, or application of the New Source Review provisions of state or federal law and how Defendants planned to comply with those provisions, including , but not limited to, the routine maintenance, repair, or replacement provisions, the method by which emissions calculations must be performed for determining whether there has been a “net emission increase” associated with a construction project, the interpretation of *Wisconsin Electric Power Company v. Reilly*, 893 F.2d 901 (7th Cir. 1990), the administrative determinations that were the subject of that case, and the Applicability Determination issued to Detroit Edison on May 23, 2000, and the application of NSR to Defendants’ generating units. This specifically includes Documents authored by third parties and all Communications related to the subject.
7. Produce all Documents relating to forced and/or scheduled outages at Monroe Unit 2 for the period January 1, 2000 to the present, including the causes of these outages, activities conducted during these outages, and the duration of these outages. This Request includes, but is not limited to, event, performance, and design reports from the Generating Availability Data System (GADS), or any other reports of forced or scheduled outages at each

EGU, for purposes of determining the availability and reliability of each EGU or for documenting activities conducted during these outages, including any analysis of North American Electric Reliability Council (NERC) reports on plant availability/reliability. All GADS event and performance reports are requested in Excel format, as provided by NERC. All GADS design reports are requested in Acrobat or PDF format.

8. Produce all Documents relating to whether any projects similar to the Project have been performed at any electric generating unit or coal-fired boiler anywhere in the electric utility industry and how often complete Boiler Component replacements have been performed in the electric utility industry.

9. Produce all Documents, for the period from January 1, 1980 to the present, related to any efforts or practices by Defendants to avoid triggering NSR for any coal-fired generating unit. Potential examples of such efforts include, internal administrative emissions limits, synthetic minor permits, netting out of emissions increases, etc. *See also* Doc. # 46-3 (Declaration of Colin Campbell). This Interrogatory specifically includes, but is not limited to, Defendants' response to and practices for complying with EPA's May 23, 2000 Applicability Determination issued to Detroit Edison.

10. Produce all Documents related to the three PROMOD runs cited by Mr. Michael King in his November 2010 declaration in this action, including the 2009 PSCR run as originally performed and as modified by Mr. King's request, and any other PROMOD runs performed after January 1, 2008. The information to be produced includes, but is not limited to, (i) input and output data specifically identified as such, (ii) settings information; (iii) all information necessary to run the PROMOD simulations, (iv) information describing current conditions, and (v) any explanatory materials related to the operation of the model (including instructions and user guides), (vi) documents relating to the development or discussion of input values related to availability or outage rates used in the model runs, (vii) communications between Mr. King and DTE employees related to PROMOD or the runs he reviewed, and (viii) related further analyses and interpretations of the results of each of the runs. This Request includes, but is not limited to all associated files, notes, memoranda, and reports. All data inputs necessary to replicate the PROMOD runs should be produced in an electronic format suitable for loading into the PROMOD program. All data files associated with these runs, regardless of whether the use is

directly related to the version of the model run or output provided to the Michigan Public Service Commission must be provided.

11. Produce all Documents related to the amount of generation from Monroe Unit 2, including Documents related to generation from coal-fired units in general, Documents related to the factors that affect generation at Monroe Unit 2, Documents related to the relationship between generation and availability, and projections of generation from Monroe Unit 2.

Documents specific to generation from Monroe Unit 2 need only be produced if they are created after January 1, 2007.

12. Produce all Documents that describe or specify the expected useful economic life, depreciation period, and the planned or projected retirement date for the Boiler, turbine, and Generator of any unit at Monroe Power Plant. Included in this Request are all financial and engineering analyses pertaining to the anticipated retirement of any Boiler or EGU at Monroe Power Plant, and all Documents discussing accounting practices related to the expected lifetime of each of Defendants' coal-fired power plants for depreciation purposes.

13. Produce all Documents that indicate or describe when a given activity is to be expensed or capitalized in Defendants' accounting records. This Request includes, but is not limited to, Defendants' internal capitalization and expense policies, including all changes and modifications thereto, as well as all internal company Documents, manuals, policies, and procedures describing the capital budget and maintenance expense budget processes that pertain to, or have been in use at, each of Defendants' Plants. This Request also includes a copy of the procedures for the approval of projects involving Capital Expenditures at Monroe Unit 2.

14. Produce all Documents summarizing or analyzing the annual maintenance budgets, annual maintenance expenditures, annual capital expenditure budget, and annual Capital Expenditures for each of the Plants.

15. Produce all Documents, including all internal company Documents, manuals, policies, and procedures, relating to the work order process for Capital Expenditures, including the techniques, methodologies, assumptions, and values used in estimating the benefits of, present values of, present worth of, or returns on, a capital expenditure.

16. Produce organizational charts illustrating the management and operational structure of DTE Energy, Detroit Edison, and the Monroe Power Plant, as well as job or position descriptions for all management and supervisory positions, as of the time of the Project.

17. Produce all training materials, internal policy memos, manuals and guidance relating to the NSR, PSD, and Nonattainment NSR provisions of the Clean Air Act and related regulations. This Request includes, but is not limited to, all manuals and guidance regarding the evaluation of projects, maintenance, or modifications to determine applicability of, or compliance with, such provisions.

18. Produce the complete property record for each of the Monroe Power Plant (including each of the individual Units), whether in paper form or in an electronic file, from original placement in service to the present, which You are required to maintain pursuant to 7 C.F.R. Pt. 1767, FERC General Instruction 12, and FERC Electric Plant Instruction 11 (Work Order and Property System Required) and FERC Definition 8 (Continuing Plant Inventory Record). This Request includes, but is not limited to, the records that Defendants are required to maintain in accordance with 7 C.F.R. Pt. 1767 General Instruction (l) (Records for Each Plant); Electric Plant Instruction (k) (Work Order and Property Record System Required); Electric Plant Instruction (j) (Additions and Retirements of Electric Plant); and the definition of "Continuing Property Records" found at 7 C.F.R. § 1767.10. This Request also specifically includes the complete property additions and retirement unit listing pertaining to Monroe Power Plant (as required to be maintained in accordance with Electric Plant Instruction (j)); including all narrative and explanatory Documents explaining terms and entries within the property unit listing, and all changes and modifications thereto, from the year each EGU was originally placed in service to the present. To the extent they are maintained in electronic format, the property records are also requested in electronic format.

19. Produce the complete property additions and retirement unit listing pertaining to the Monroe Power Plant (as required to be maintained in accordance with FERC Electric Plant Instruction No. 10), including all narrative and explanatory Documents explaining terms and entries within the property unit listing, and all changes and modifications thereto, from the year each EGU was originally placed in service to the present.

20. Produce all Documents that were reviewed in preparing, or that contain facts that support, Your responses to Plaintiffs' First Set of Interrogatories served simultaneously with these Requests.

21. Produce all Documents and Communications relating to any expert witness that You retain in connection with this litigation, including, but not limited to, contractual documents, invoices, and expert work products, and items exchanged between You and any expert witness. This Request does not apply to any materials that are not discoverable under the terms of the Expert Agreement between the Parties and filed with the Court on October 27, 2010 (Doc. # 44).

22. Produce all Documents and Communications reviewed by each expert witness that You retain in connection with this litigation.

23. Produce all articles, publications, or presentations ("public statements") that Your Witnesses have authored, co-authored, presented, or co-presented, provided that such public statements concern the subject matter(s) of Your Witnesses' testimony in this matter. For purposes of this Request, "presentations" mean PowerPoint slides, handouts, and other written materials that Your Witness reviewed, provided to, or showed an audience while lecturing or speaking.

Respectfully Submitted,

IGNACIA S. MORENO
Assistant Attorney General
Environment & Natural Resources Division

Dated: January 28, 2011

OF COUNSEL:
SABRINA ARGENTIERI
MARK PALERMO
SUSAN PROUT
Associate Regional Counsel
U.S. EPA Region 5
Chicago, IL
77 W. Jackson Blvd.

/s/ Thomas A. Benson
JUSTIN A. SAVAGE
Senior Counsel
THOMAS A. BENSON (MA Bar # 660308)
KRISTIN M. FURRIE
Trial Attorneys
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
(202) 616-6515
kristin.furrie@usdoj.gov

APPLE CHAPMAN
Attorney Advisor
U.S. EPA
1200 Pennsylvania Ave. NW
Washington D.C. 20460

BARBARA McQUADE
United States Attorney
Eastern District of Michigan

ELLEN CHRISTENSEN
Assistant United States Attorney
211 W. Fort St., Suite 2001
Detroit, MI 48226

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2011, the foregoing discovery requests were served via email on counsel of record.

/s/ Thomas A. Benson
Counsel for the United States

EXHIBIT 5
TO DEFENDANTS'
MEMORANDUM OF LAW
IN SUPPORT OF MOTION
FOR PROTECTIVE
ORDER



U.S. Department of Justice

Environment and Natural Resources Division

90-5-2-1-09949

*Environmental Enforcement Section
P.O. Box 7611
Ben Franklin Station
Washington, DC 20044-7611*

*Telephone (202) 514-5261
Facsimile (202) 616-6584
Thomas.Benson@usdoj.gov*

March 8, 2011

By Email

Mark Bierbower, Esq.
Hunton & Williams LLP
1900 K Street, NW
Washington DC 20006
mbierbower@hunton.com

Re: *United States v. DTE Energy Co., et al., No. 10-13101 (E.D. Michigan)*

Dear Mark:

This letter responds to Defendants' answers to Plaintiff's first set of interrogatories and document requests (collectively "Responses"). Defendants' response is incomplete and inadequate in several respects, as described below.¹ In several cases, Defendants have flatly refused to provide relevant information. Given the importance of this discovery and the press of deadlines in the case, we seek to meet and confer with you at your earliest convenience regarding Defendants' Responses.

Failure to Provide Project Information

Defendants have refused to provide information on the project at issue in this case. Plaintiffs' interrogatories and document requests explicitly called for information concerning the replacement of the following components during the Spring 2010 outage at Monroe Unit 2:

"Elements of the Project" mean individual replacements or other work performed during the Project, i.e., the replacement of the pendant reheater and the generator rotor rewind are each Elements of the Project. Elements of the Project include, but are not limited to, work on each of the following components:

- a. Economizer
- b. Pendant reheater
- c. Static exciter

¹ This letter reflects our initial review of Defendants' Responses. We reserve the right to raise additional concerns as we continue to evaluate the Responses.

- d. Waterwalls
- e. Generator lead box
- f. Generator rotor
- g. Expansion joints
- h. Cables
- i. 210 Valve"

Plaintiffs' First Set of Interrogatories, Definition 15; Plaintiffs' First Set of Document Requests, Definition 15.

Defendants provided information on only three of the replaced components. There is no basis for this failure to respond. All of this work was performed as part of the overhaul project constructed by Defendants during the Spring 2010 outage at Monroe Unit 2. It is not for Defendants to define what aspects of the work done during the outage count for New Source Review purposes. That is the province of the Court, as your client acknowledges. *See* Defendants' Interrogatory Responses, Objection to Definition # 8 (terms like "modification" are "terms of art that lie at the heart of this case, and their meaning under the Clean Air Act is subject to substantial disagreement among the parties."). Defendants' unilateral decision to provide only a limited subset of responsive information related to the project centrally at issue in this case prejudices Plaintiff's ability to prepare for trial.²

The following interrogatory responses are not complete due to Defendants' failure to provide relevant information related to the project: 2, 5-8, 12-13, 15-16, and 18. In addition, Defendants must produce relevant documents responsive to Plaintiff's document requests, notwithstanding Defendants' objection to the Elements of the Project definition.

Failure to Provide NSR Information

Defendants have refused to provide information related to Defendants' efforts to avoid triggering NSR. *See* Defendants' Interrogatory Responses, Interrogatory No. 9; Defendants' Document Responses, Request No. 9. Contrary to Defendants' contention, this information is relevant because it addresses how Defendants have sought to comply with NSR and what options

² We note that Defendants are incorrect in alleging that the notice of violation was limited to three of the replacements performed during the project. The NOV refers to a major modification that includes but is not limited to the three boiler component replacements for which Defendants would allow discovery. June 4, 2010 NOV ¶¶ 20, 23; *see also* Complaint ¶¶ 46, 50, 55 (describing overhaul project at issue as including "the complete replacement of two major boiler components" at a cost of \$30 million and continuing, "*The project as a whole cost approximately \$65 million and was unprecedented in the 40-year history of the Monroe Power Plant.*") (emphasis added).

they might choose (or could have evaluated) in performing the work at Monroe Unit 2.³ Indeed, Defendants put exactly this subject at issue in this case through the declarations of Skiles Boyd and Colin Campbell opposing Plaintiff's motion for preliminary injunction. *See, e.g.*, Doc. # 46 (DTE Brief opposing preliminary injunction) at 30-31 (discussing ways DTE could have avoided triggering NSR).

Failure to Fully Respond to Interrogatories

In addition to the issues described above, Defendants have failed to provide a complete response to numerous interrogatories. We set forth many of these instances below and request that Defendants supplement with complete responses:

Interrogatories 2 and 3

Defendants have not provided a "description of how the design and materials of added or replaced Components differ from those originally installed at the plant" as required by Interrogatories 2(b) and 3. Defendants have not provided any description of how the replacements were performed, as required by Interrogatory No. 2(c).

Interrogatories 3 and 5(j)

Defendants have not provided information about where the replaced waterwall tubes were located, as required by Interrogatory 3. In addition, Defendants claim, in Interrogatory 5(j), that they are unable to accurately determine whether any outages were related to sections that were replaced. This claim is belied by project justification documents that relate the number of past outages caused by particular components. We further note that Defendants track forced outages in their GADs reports, and those reports include specifying which component caused the outage. Thus for instances of complete replacement, it is not unduly burdensome for Defendants to determine whether an outage was caused by a component that was later replaced. Defendants also track the specific location of tube failures through software such as AWARE and Boiler Maintenance Workstation which should allow Defendants to determine which components have caused outages in the past.

Interrogatory 4

Defendants have not provided a description of URS's role with respect to the project, which is required by this interrogatory. In addition, please identify the subject matter experts who advised Mr. Larlham on the Monroe Unit 2 project, as described in the description of Mr. Larlham's role. This information is within the scope of the Interrogatory. Finally, please provide the employer for each individual listed (presumably either DTE or Detroit Edison), as required by the interrogatory.

³ To the extent Defendants truly have a burden concern with respect to these requests, we will be willing to work with you to narrow their scope. Properly construed, we anticipate that there would not be an unduly large amount of responsive material.

Interrogatory 10

This interrogatory calls for prior instances in which Defendants replaced an *entire* Boiler Component. Defendants' answer refers to a chart compiled by Jerry Golden, but that chart does not distinguish between complete and partial replacements. The answer must do so.

Interrogatory 11

This interrogatory specifically called for information gathered *before* the project relating to how many similar projects or Boiler Component replacements have been performed at coal-fired boilers in the electric industry. The response does not include any specific pre-project information on this score. If any information exists, it should be produced. If the company did not have such a "routine in the industry" analysis before the project, the response needs to acknowledge that fact.

Interrogatories 13, 15, and 16

Defendants' response to Interrogatory 13 states that the company's defense "may involve using one or more approaches, methodologies or calculations, including..." To the extent that Defendants will rely on any non-specified approach, methodology or calculation, it should be produced. Interrogatories 15 and 16 incorporate the response to 13 by reference.

Interrogatory 22

Plaintiff does not object to Defendants providing much of the information sought by this interrogatory through production of relevant documents. However, the interrogatory requires and Plaintiff seeks a narrative description of the date, purpose, model (including version), and responsible people for each run performed.

Interrogatory 28

Defendants have failed to provide any substantive response to this interrogatory (other than citing to documents that identify individuals working on the project itself). To the extent Defendants believe the request is unduly burdensome, we would be willing to discuss ways to narrow the scope. However, identifying managers at the plant for five years is not overly burdensome and is relevant to the pre-project conditions at Monroe Unit 2 and the planning for the project.

Interrogatories 29-34

Each of these interrogatories addresses information related to Defendants' trial witnesses, and Defendants failed to provide a substantive response in each instance. We note that Defendants have disclosed six fact witnesses as likely to call or may call for trial. We need information on these individuals to take their depositions and prepare for trial. Simply saying that Defendants have not yet decided who will testify at trial is not sufficient to prevent discovery.

Interrogatory 35

This interrogatory asks for the author and recipient of a handful of documents. Defendants failed to provide any information about recipients. Even assuming that Defendants are correct that it would impossible to identify all recipients, some answer is required. We are

willing to discuss this response with you, but suggest that the primary intended recipients could be identified.

Schedule for Production of Documents

Defendants have produced a handful of documents thus far and stated that the production will be made on a rolling basis. Based on Jennifer Smith's representation, we expect that Defendants' production will be complete by the beginning of April. As we have discussed, this will leave Plaintiff very little time to review documents before serving expert reports, and our discussions on the appropriate expert schedule depend on a timely production of documents.

Thank you for your attention to this matter. Please advise when you will be prepared to discuss the Responses and the deficiencies identified above. I am available to do so this week.

Sincerely,

s/Thomas A. Benson
Thomas A. Benson
Trial Attorney

cc: Counsel of Record
Jennifer Smith

EXHIBIT 6
TO DEFENDANTS'
MEMORANDUM OF LAW
IN SUPPORT OF MOTION
FOR PROTECTIVE
ORDER

HUNTON & WILLIAMS LLP
BANK OF AMERICA PLAZA
SUITE 3500
101 SOUTH TRYON STREET
CHARLOTTE, NORTH CAROLINA
28280

TEL 704 • 378 • 4700
FAX 704 • 378 • 4890

BRENT A. ROSSER
PARTNER
DIRECT DIAL: 704-378-4753
EMAIL: brosser@hunton.com

FILE NO: 55788.42

March 18, 2011

Via Electronic Mail

Thomas A. Benson
U.S. Department of Justice
Environment and Natural Resources Division
Washington, DC 20044-7611

Re: *United States v. DTE Energy Co., et al., No. 10-13101*

Dear Tom:

This letter addresses deficiencies contained in Plaintiff's responses to Detroit Edison's First Set of Interrogatories and Requests for Production of Documents.¹ We suggest the parties set a time to meet and confer on these deficiencies once EPA has an opportunity to consider and review them.

- **EPA's Document Dump.** EPA's production of 4.5 million pages of documents in response to Detroit Edison's requests does not comply with Rule 34. Rather, it appears that EPA merely copied a hard drive containing documents related to other NSR cases without conducting any review to determine whether the documents were responsive to Detroit Edison's requests. EPA also failed to indicate which documents are responsive to which numbered document requests. Courts have rejected similar document dumps by EPA in NSR cases, and the agency provides no justification of why it is appropriate here. *United States v. Duke Energy Corp.*, No. 1:00CV01262, at 6 n.1 (M.D.N.C. Feb. 5, 2002) ("This Court's order [granting EPA a five-month extension of discovery] was designed to allow [EPA] to produce documents in an ordered manner without engaging in a 'document dump.'"); *United States v. Illinois Power Co.*, No. 99-833, at 3 (S.D. Ill. Oct. 23, 2001) ("That [there are a large number of documents] is an inescapable characteristic of this type of litigation, which fact was surely known to the United States before suit was filed. This United States is certainly

¹ This letter reflects Detroit Edison's preliminary analysis of Plaintiff's responses to its First Set of written discovery. Detroit Edison reserves the right to identify additional deficiencies in Plaintiff's responses upon further review, and as EPA's document production continues.

Thomas A. Benson
March 18, 2011
Page 2

more familiar with its documents than Defendants are, and can more readily locate responsive documents stored in its archives.”). Given the expedited trial schedule in this case, the need for EPA to comply with Rule 34 is especially important. *S.E.C. v. Collins & Aikman Corp.*, 256 F.R.D. 403, 410 (S.D.N.Y. 2009) (Rule 34 “prohibits simply dumping large quantities of unrequested materials onto the discovering party along with the items actually sought.”).

- **EPA’s Reference to “Publically Available EPA Documents” and Databases.** In response to Request Nos. 6, 12, 13, 14, 15, 16, 17, 18, 20, 30 and 31, EPA refers Detroit Edison to eleven EPA websites and indicates that it “will identify publicly available databases maintained by EPA that may contain documents responsive to Defendants’ requests.” Again, this does not comply with Rule 34. *See, e.g., Collins & Aikman Corp.*, 256 F.R.D. at 414 (rejecting agency’s blanket production of 1.7 million documents maintained on various databases as non-compliant with Rule 34). Moreover, many of the websites contain information having nothing to do with the Clean Air Act, let alone the New Source Review provisions of the Clean Air Act, and instead pertaining to completely unrelated statutes that are irrelevant to this case, including the Endangered Species Act, the Federal Insecticide, Fungicide and Rodenticide Act, and California’s Oil Spill Prevention and Response Act, among others. Rather than bury relevant documents among a slew of irrelevant materials, EPA is required to produce the responsive documents from these sources and organize them to correspond to each request.
- **EPA’s Objection Based Upon Proprietary/Confidentiality Restrictions.** EPA objects to the extent the Detroit Edison’s requests seek information that is confidential and/or governed by proprietary restrictions. Given the protective order that has been entered in this case, such restrictions should not bar production of these materials. Doc. No. 39 at 9 (“This Protective Order is designed to facilitate the disclosure of documents in this Action that a Party or non-Party considers to be ‘Confidential Information.’”).
- **EPA’s Refusal to Produce Documents Containing the Views of EPA Employees.** Citing *United States v. Farley*, 11 F.3d 1385 (7th Cir. 1993), EPA contends that Detroit Edison is not entitled to information related to the views of EPA employees regarding the interpretation and implementation of NSR. *Farley* conflicts with *State of Ohio Dep’t of Human Services v. US Dep’t of Health and Human Services*, 862 F.2d 1228, 1235 (6th Cir. 1988) (interpretations of the applicable regulations even by low-ranking agency officials “highly relevant and material evidence”). Consistent with Sixth Circuit precedent, EPA must search the files of, and produce documents from, individual EPA employees in response to Detroit Edison’s requests. *See, e.g., United States v. Am. Elec. Power Serv. Corp.*, 2001 U.S. Dist. LEXIS 18723, *17 (S.D. Ohio June 19, 2001) (“[T]o the extent that there is some conflict between Ohio

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Page 3

Department of Human Services and Farley, this Court is required to follow the former decision because it is the law in this circuit.”). Please confirm that EPA will do so.

- **EPA’s Refusal to Search All EPA Regions for Responsive Documents.** EPA’s unilateral refusal to search all EPA regions for responsive documents is not sufficient. *United States v. Illinois Power Co.*, No. 99-833-MJR (S.D. Ill. Jan. 10, 2001) (“[T]his [c]ourt believes that defendant is entitled to production of responsive documents from all ten Regions of EPA, insofar as these offices are involved in the enforcement of the Clean Air Act.”). Please confirm that EPA will search all EPA Regions for responsive documents.
- **EPA’s Refusal to Produce Documents Related to NSPS.** Because EPA considers the term “routine” to mean substantially—if not exactly—the same under the PSD and NSPS programs, Detroit Edison is entitled to documents related to EPA’s consideration of “routine” under NSPS. *See*, Deposition of Walter Stevenson (EPA 30(b)(6) designee) taken on April 10, 2002, in *U.S. v. Duke Energy Corporation*, No. 1:00-cv-1262. Please confirm that EPA will search for and provide such documents.
- **EPA’s Specific Responses to Requests for Production.**
 - **Response to No. 2.** EPA objects to producing surveys, studies, databases or other compilations created, possessed or maintained by EPA that identify or track projects undertaken by electric utilities on relevance grounds; however, in other NSR cases, EPA has claimed that it “has long considered industry practice ... under the interpretation of ... routine maintenance ...,” *United States v. Alabama Power*, No. 1-152-VEH, EPA Reply Regarding the Correct Legal Tests (October 28, 2004) at 55. Detroit Edison is entitled to know what information EPA has maintained, if any, to track such “industry practice.” Moreover, it is Detroit Edison’s position that industry practice is centrally relevant to, indeed *the* standard for, what activities are routine maintenance, repair, and replacement under NSR—a position that has been adopted by the majority of courts that have considered this issue. *See, e.g.*, Doc. No. 46 at 11-13. Accordingly, the information requested is clearly relevant and must be produced.
 - **Response to No. 3.** EPA states that it has “volunteered to work with Defendants to produce confidential documents to the extent Defendants can obtain permission from the company asserting the claim of confidentiality.” EPA offered to prepare a list of companies targeted by EPA, which Detroit Edison accepted on February 23, 2011. Please let us know when we can expect that list, which should include the companies recently targeted by EPA under Section 114 (*e.g.*, Foster Wheeler) for information regarding future projects.

Thomas A. Benson
March 18, 2011
Page 4

- **Response to No. 8.** EPA objects to providing “back-up information on preliminary emissions calculations where it is anticipated that any emissions calculations offered on summary judgment or at trial would be developed through expert proof.” That is not a legitimate objection, and Detroit Edison requests a full and complete answer to its Request for Production No. 8.
- **Responses to Nos. 12 and 15.** EPA appears to object to producing documents in response to Request Nos. 12 and 15 to the extent they request materials related to “fossil-fuel fired boilers” generally, and not just to the “coal-fired electric utility boilers that are the subject of this suit.” Detroit Edison is entitled to production of responsive documents relating to other coal-fired units because the application of the applicable regulations to those units would be relevant to the claims and defenses in the case. Likewise, Detroit Edison is “entitled to production of responsive documents in the possession of EPA relating to industries other than coal-fired steam electricity generators, as the application of the ‘major modification rule’ under the [CAA] to those industries would be relevant to the defenses raised by” Detroit Edison. *United States v. Illinois Power Co.*, No. 99-833-MJR (S.D. Ill. Jan. 10, 2001).
- **EPA’s Specific Responses to Interrogatories.**
 - **Responses to No. 7-13, 16.** These responses cite Rule 33(d) of the Federal Rules of Civil Procedure but fail to specify the records in sufficient detail for Detroit Edison to locate and identify the records from which the answer may be ascertained. Vague references to a mass of records is not sufficient. *See, e.g., See Sungjin Fo-Ma, Inc. v. Chainworks, Inc.*, 2009 WL 2022308 * 4 (E.D. Mich. Jul. 8, 2009) (“[D]irecting the opposing party to an undifferentiated mass of records is not a suitable response to a legitimate request for discovery.”). To the extent EPA has provided or will provide documents pursuant to Rule 33(d), please identify those documents by bates-label.
 - **Response to No. 9.** In response to EPA’s objection to this Interrogatory as overbroad, Detroit Edison is willing to narrow it to NSR and NSPS but request that EPA provide a full and complete response based on those programs.

Thomas A. Benson
March 18, 2011
Page 5

- **Response to No. 10.** In response to EPA's objection to this Interrogatory as overbroad, Detroit Edison is willing to narrow this request to tube component replacement projects exceeding \$500,000 in cost.²
- **Response to No. 11.** EPA provides no justification for refusing to produce inspection reports after January 1997. Clean Air Act compliance inspections conducted after that date are relevant as well, and Detroit Edison requests that those be identified and produced. Moreover, to the extent EPA has already provided or will provide inspection reports before January 1997, please identify those documents by bates-label. Again, vague references to a mass of records is not sufficient for purposes of Rule 33(d).

Sincerely yours,

/s/ Brent A. Rosser

cc: Counsel of Record for Defendants
Counsel of Record for Plaintiff

² Given the nature of the "routine" inquiry, Detroit Edison's request that EPA identify projects involving the replacement of tube components is not burdensome, especially when EPA has typically requested under Section 114 information regarding projects that cost more than \$250,000, and even \$100,000 in some cases. Nevertheless, as indicated, Detroit Edison is willing to limit this interrogatory to projects costing more than \$500,000.

EXHIBIT 7
TO DEFENDANTS'
MEMORANDUM OF LAW
IN SUPPORT OF MOTION
FOR PROTECTIVE
ORDER

Eastern District of Kentucky

FILED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

DEC 01 2005

AT LEXINGTON
LESLIE G WHITMER
CLERK U S DISTRICT COURT

CIVIL ACTION NO. 04-34-KSF

UNITED STATES OF AMERICA,

PLAINTIFF

V.

MEMORANDUM ORDER

EAST KENTUCKY POWER
COOPERATIVE, INC.,

DEFENDANT

I. INTRODUCTION

On January 28, 2004, plaintiff filed this action against defendant East Kentucky Power Cooperative, Inc. ("EKPC"), pursuant to Sections 113(b) and 167 of the Clean Air Act ("the Act"), 42 U.S.C. §§ 7413(b) and 7477, for injunctive relief and the assessment of civil penalties for violations of the Prevention of Significant Deterioration ("PSD") provisions of the Act, 42 U.S.C. §§ 7470-92, the New Source Performance Standards ("NSPD") of the Act, 42 U.S.C. § 7411, Title V of the Act, 42 U.S.C. § 7661 *et seq.*, and the State Implementation Plan ("SIP") adopted by the Commonwealth of Kentucky and approved by the United States Environmental Protection Agency ("EPA") pursuant to § 110 of the Act, 42 U.S.C. § 7410.

Plaintiff alleges that various violations of the Act occurred at the following three plants: Spurlock Steam Plant, Unit No. 2; Dale Steam Plant, Unit No. 4, 1994-1995 Project; Dale Steam Plant No. 3, 1996 Project.

Plaintiff seeks injunctive relief, an Order directing EKPC to remedy its past violations of the Act and to otherwise comply with the Act, an Order directing EKPC to conduct audits of its operations to determine if any additional modifications have occurred that would require compliance with the Act and to report the results of these audits to the plaintiff, an Order directing EKPC to take other appropriate actions to remedy, mitigate, and offset the harm to public health and the

environment resulting from its violations of the Act, the assessment of statutory, civil penalties against EKPC for its violations of the Act, and its costs of this action.

This matter is before the court on the defendant's motion, filed pursuant to Fed.R.Civ.P. 26, for a protective order limiting plaintiff's discovery to the claims and defenses related to the three projects identified in the complaint that are the basis for this action against EKPC, viz., work performed at defendant's Spurlock Unit No. 2 in 1992 to extract steam and supply it to an adjacent box-making plant, work performed at defendant's Dale Unit No. 4 in 1994 to 1995, and work performed at defendant's Dale Unit No. 3 in 1996 to 1997.¹

II. EKPC'S MOTION FOR A PROTECTIVE ORDER

As grounds for its motion for a protective order, EKPC states that in subpoenas plaintiff has issued to seven nonparty contractors² and in plaintiff's discovery requests served on EKPC, plaintiff seeks discovery concerning EKPC's projects that occurred both *before* and *after* the specific projects identified in the complaint that comprise plaintiff's cause of action against it. More particularly, EKPC asserts that the seven subpoenas and discovery requests at issue seek information regarding other activities conducted on these same units identified in the complaint (Spurlock Unit No. 2, Dale Unit No. 4, and Dale Unit No. 3) and activities conducted on other units that were not referenced in the complaint. Specifically, EKPC seeks a protective order prohibiting discovery on Spurlock Unit No. 1 and the 1997 turbine work on Spurlock Unit No. 2, urging that discovery herein should be confined to the following projects:

- projects performed on Spurlock Unit No. 2 in 1992 to convert Unit No. 2 from an electricity-generating-only unit to a cogeneration unit (Complaint at ¶ 49)

¹ Pursuant to numerical ¶ 11 of the district court's Third Amended Scheduling Order entered on November 21, 2005, all discovery disputes were referred to the Magistrate Judge for resolution, pursuant to 28 U.S.C. § 636(b)(1)(A). [DE #52].

² The seven, nonparty contractors to whom subpoenas have been issued are Babcock & Wilcox, Riley Power, Yuba Heat, Barron Industries, General Electric, Black & Veatch, and Alstom Power.

- projects performed on Dale Unit No. 4 in 1994 to 1995 (Complaint at ¶ 60)
- projects performed on Dale Unit No. 3 in 1996 to 1997 (Complaint at ¶ 76)

As grounds for this argument, EKPC points out that the Notice of Violations (NOVs) EPA issued to it in January and July of 2003, specifically identified four EKPC projects that allegedly violated the Act and Kentucky's SIP: (1) a project at Dale Unit No. 4 in 1994-1995 that involved component replacements to convert the Dale Unit No. 4 boiler from a pressurized furnace to a balance draft furnace; (2) a 1996 project at Dale Unit No. 3 that involved the routine maintenance, repair and replacement of certain boiler components, as well as pollution control projects; (3) a 1992 project at Spurlock Unit No. 2 to extract steam and supply it to an adjacent box-making plant; and (4) a 1997 project at Spurlock Unit No. 2 that involved the replacement of some turbine components. EKPC contends that since the EPA's NOVs concern only the foregoing projects, EPA lacks jurisdiction to bring suit against it on any projects not included in its NOVs; therefore, plaintiff should be barred from obtaining discovery on any projects other than the ones identified in its NOVs.

In response, plaintiff argues that it is entitled to the requested discovery at issue because (1) it is relevant to the claims and defenses asserted herein, (2) discovery should not be limited to information specifically within the claims in the pleadings, and (3) EKPC has not established good cause for a protective order. For these reasons, plaintiff asserts that EKPC's motion for a protective order should be denied.

In reply, EKPC advises that it understands that the third-party independent contractors served with subpoenas have complied with the subpoenas and have completed their document production. Therefore, EKPC acknowledges that its motion for a protective order is moot with respect to those subpoenas; however, EKPC points out its motion for a protective order is not moot with respect to plaintiff's discovery requests served on it which seek similar information concerning work performed on Spurlock Unit No. 1 and the 1997 turbine work on Spurlock Unit No. 2.

Analysis

In considering this matter, the Magistrate Judge is mindful of the scope of discovery permitted by Fed.R.Civ.P. 26(b)(1), subsequent to the 2000 amendment thereto, which permits "discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, . . . Relevant evidence need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Additionally, the Magistrate Judge is guided by the statutory scheme of the Clean Air Act, which, as set out in greater detail below, provides that an alleged violator be notified of the specific violation as a prerequisite to maintaining a civil action against the alleged violator.

Section 113(a)(1) of the Act, 42 U.S.C. § 7413(a)(1), provides that prior to filing a civil action against an alleged violator, the EPA must first issue a NOV to the alleged violator. Thirty (30) days subsequent to the issuance of a NOV, the EPA may then bring a civil action against the alleged violator. "The requirement is jurisdictional." *United States v. Ford Motor Co.*, 736 F.Supp. 1539, 1550 (W.D. Mo. 1990). Thus, "EPA is empowered to bring . . . a civil suit *only* on the basis of the *specific* violation alleged in the NOV. . . ." *United States v. Louisiana-Pacific Corp.*, 682 F.Supp. 1141, 1155 (D. Colo. 1988) (emphasis added); *see also United States v. Brotech Corp.*, No. Civ. A. 00-2428, 2000 WL 1368023, at *2 (E.D. Pa. Sept. 19, 2000) ("[Section] 113(a)(1) requires that an alleged violator receive notice of specific violations of the State Implementation Plan or permit regulations before EPA can file a civil action"). EPA cannot "expand [the suit] beyond the specific violations alleged in th[e] letter." *Id.* "As a result, *not every violation of the PSD provisions is actionable*, but only those where the alleged offender is notified of the violation . . ." *Louisiana-Pacific Corp.*, 682 F.Supp. at 1155 (emphasis in original). "[T]o allow the EPA to notify the alleged of one violation, and then bring a civil action on basis [of] another violation (different than that alleged in the notice) . . . would completely frustrate the notice requirement created by Congress." *Id.* at 1128.

As previously stated, in the present action, in January and July of 2003, the EPA issued two NOVs to EKPC, which specifically identified the following four EKPC projects that allegedly violated the Act and Kentucky's SIP: (1) a project at Dale Unit No. 4 in 1994-1995 that involved component replacements to convert the Dale Unit No. 4 boiler from a pressurized furnace to a balance draft furnace; (2) a 1996 project at Dale Unit No. 3 that involved the routine maintenance, repair and replacement of certain boiler components, as well as pollution control projects; (3) a 1992 project at Spurlock Unit No. 2 to extract steam and supply it to an adjacent box-making plant; and (4) a 1997 project at Spurlock Unit No. 2 that involved the replacement of some turbine components.

It is clear from the plain language of 42 U.S.C. § 7413(a)(1) that to set the stage for the filing of a civil action against EKPC, the EPA was required to issue a NOV to EKPC to put it on notice of the alleged violation(s) of the Act. The EPA complied with the Act by issuing NOVs to EKPC concerning the foregoing four projects and then filed the instant action against EKPC that referenced only three of these four projects.³

Based on well-settled law that the EPA may only bring a civil action against an alleged violator of the Act on the basis of the charged violation(s) contained in a NOV previously issued to that alleged violator, the Magistrate Judge concludes that plaintiff lacks jurisdiction to assert any claims against EKPC that were not contained in the NOVs to EKPC. Likewise, it follows that plaintiff should be barred from obtaining discovery from EKPC concerning projects that were not contained in the NOVs and then contained in its complaint, since discovery concerning these other projects has no relevance to the claims or defenses asserted herein in respect to the three projects that form the basis for plaintiff's complaint against EKPC.

³ For reasons unknown to the court, plaintiff's complaint made no reference to and did not charge a violation of the Act with respect to the 1997 project at Spurlock Unit No. 2 that involved the replacement of some turbine components. However, since EKPC was put on notice of this alleged violation in the NOV, plaintiff could move for leave to amend its complaint to include this alleged violation. If plaintiff's complaint were amended to assert a claim for a violation of the Act with respect to the 1997 project at Spurlock Unit No. 2 that involved the replacement of some turbine components, then plaintiff could obtain discovery on that claim, as EKPC was put on notice of this claim in the NOV.

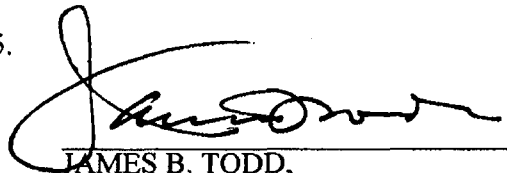
The Magistrate Judge is unpersuaded by plaintiff's argument that its complaint is "broad" enough to encompass other EKPC projects that violated the Act and that it should not be limited in discovery to the projects specifically pled. Plaintiff's statement that EKPC undertook "one or more major modifications" is too broad and too vague to comply with the requirements of notice pleading. In a nutshell, plaintiff is not free simply to recharacterize its complaint as being "broad" enough to permit it to obtain discovery from EKPC on projects not identified in the complaint. This argument also ignores the basic jurisdictional requirement of the Act that plaintiff cannot bring an action against an alleged violator of the Act without first having put the alleged violator on notice of the alleged violation. Consequently, if there is no jurisdictional basis for a claim, there is also no basis for allowing plaintiff to obtain discovery on said claim.

The Magistrate Judge is also unpersuaded by plaintiff's argument that lack of jurisdiction is no basis for granting EKPC's motion for a protective order, since its complaint was also filed under 42 U.S.C. § 7477 which has no jurisdictional prerequisite. 42 U.S.C. § 7477 authorizes the EPA to bring an action "*to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part, or which is proposed to be constructed . . .*" (emphasis added). This action concerns projects and/or modifications that were completed years ago, not *proposed* projects.

For all of the foregoing reasons, the Magistrate Judge concludes that EKPC's motion for a protective order has merit.

Accordingly, **IT IS HEREBY ORDERED** that defendant's motion for a protective order [DE #21] prohibiting plaintiff from obtaining discovery from it concerning Spurlock Unit No. 1 and the 1997 turbine work on Spurlock Unit No. 2 is **GRANTED**.

This 15th day of December, 2005.



JAMES B. TODD,
UNITED STATES MAGISTRATE JUDGE

EXHIBIT 8
TO DEFENDANTS'
MEMORANDUM OF LAW
IN SUPPORT OF MOTION
FOR PROTECTIVE
ORDER

October 30, 2000

BY CERTIFIED MAIL: RETURN RECEIPT REQUESTED

Chairman Craven Crowell
Tennessee Valley Authority
Corporate Headquarters
400 W. Summit Hill Dr.
Knoxville, TN 37902-1499

Manager
TVA John Sevier Fossil Plant
Hwy 70 S
PO Box 2000
Rogersville, TN 37857-1900

Manager
TVA Johnsonville Fossil Plant
Hwy 70
PO Box 259
New Johnsonville, TN 37134-0259

Manager
TVA Colbert Fossil Plant
900 Steam Plant Rd
Tuscumbia AL 35674-6906

Manager
TVA Widows Creek Fossil
Plant
Steampant Rd Off Hwy 72
PO Box 2000
Stevenson AL 35772-2000

Manager
TVA Bull Run Fossil Plant
1265 Edgemoor Rd
Clinton TN 37716-6270

Manager
TVA Paradise Fossil Plant
13246 State Route 176
Suite 10
Drakesboro, KY 42337-2345

Manager
TVA Shawnee Fossil Plant
7900 Metropolis Lake Rd
West Paducah KY 42086-9414

Manager
TVA Allen Fossil Plant
2574 Plant Road
Memphis, Tennessee 38109-3014

Manager
TVA Cumberland Fossil Plant
815 Cumberland City Rd
PO Box 2000
Cumberland City TN 37050-2000

Manager
TVA Kingston Fossil Plant
Swan Pond Rd
PO Box 2000
Kingston TN 37763-2000

RE: Notice of Intent to Sue for Violations of the Clean Air Act at the Allen, Bull Run, Cumberland, Kingston, John Sevier, Paradise, Shawnee, Colbert, Widows Creek, and Johnsonville Fossil Plants.

Dear TVA:

We are writing on behalf of the National Parks Conservation Association (NPCA) to notify you of its intent to file suit on behalf of itself and its members for significant and ongoing violations of the Clean Air Act at many of your coal-fired power plants in Tennessee, Alabama and Kentucky. For years these coal-fired power plants together have been illegally emitting, on an annual basis, at least 90,000 tons of sulfur dioxide and 180,000 tons of nitrogen oxides.

The Clean Air Act violations that are the subject of this letter have been occurring and continue to occur at the Allen Fossil Plant in Shelby County, Memphis, Tennessee; the Cumberland Fossil Plant in Stewart County, Cumberland City, Tennessee; the Bull Run Fossil Plant in Anderson County, Clinton, Tennessee; the John Sevier Fossil Plant in Hawkins County, Rogersville, Tennessee; the Kingston Fossil Plant in Roane County, Kingston, Tennessee; the Johnsonville Fossil Plant in New Johnsonville, Humphreys County, Tennessee; the Paradise Fossil Plant in Muhlenburg County, Drakesboro, Kentucky; the Shawnee Fossil Plant in McCracken County, Paducah, Kentucky; the Colbert Fossil Plant in Colbert County, Tuscumbia, Alabama; and the Widows Creek Fossil Plant in Jackson County, Stevenson, Alabama;

Pursuant to the Clean Air Act, 42 U.S.C. § 7604(a)(1), citizens are entitled to bring suit to enjoin violations of an emission standard or limitation, and to seek civil penalties for such violations. Citizens are also entitled to bring suit against any person who has modified a major emitting facility without first obtaining a PSD permit required under Part C or an NSR permit under Part D of Subchapter I of the Act, and to seek penalties for those violations as well. See Clean Air Act § 304(a)(3), 42 U.S.C. § 7604(a)(3). The Clean Air Act provides for civil penalties of up to \$27,500 for each violation *per day*. To the extent required by Section 304(a)(1) of the Clean Air Act, we therefore are writing to notify you that unless this matter is otherwise fully resolved, we intend to file suit in the applicable federal district courts anytime 60 days after the postmark date of this letter to enjoin and penalize the violations described below.¹

I. PSD/NSR VIOLATIONS

A. Background

Pursuant to the Clean Air Act, EPA has issued national ambient air quality standards ("NAAQS") for six "criteria" air pollutants, including nitrogen dioxide ("NO₂"), sulfur dioxide ("SO₂"), and particulate matter ("PM"). See 42 U.S.C. § 7409; 40 C.F.R. § 50.1 *et seq.* The Act also requires each state to classify areas within its boundaries based on whether the air quality in these areas meets these standards. An area which meets the national ambient air quality standards for a particular criteria pollutant is considered an "attainment" area for that pollutant. An area that does not meet the national ambient air quality standard for a pollutant is considered a "nonattainment" area for that pollutant. Areas for which insufficient information is available to determine whether the NAAQS are being met are termed "unclassifiable."

The purpose of Part C of the Clean Air Act (42 U.S.C. §§ 7470-7492) is to prevent any significant deterioration of air quality in areas designated as in attainment or unclassified. This purpose is achieved by requiring a Prevention of Significant Deterioration ("PSD") permit *before* any new major source of air pollutants is constructed, and *before* any existing source makes a "major modification" that will cause an increase in emissions of air pollutants. A major

¹ Although a federal instrumentality, TVA must comply with all substantive and procedural requirements of the Clean Air Act, as if it was a private party. 42 U.S.C. § 7418(a).

modification is defined in the PSD regulations as "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act." 40 C.F.R. §§ 51.166(b)(2)(i) and 52.21(b)(2)(i). A "significant" net emissions increase of sulfur dioxide (SO₂) or nitrogen oxides (NO_x) is defined in the PSD regulations as 40 tons or more per year; a "significant" net emissions increase of particulate matter is 25 tons or more per year. 40 C.F.R. §§ 51.166(b)(23)(i) and 52.21(b)(23)(i). *Before* a PSD permit may be issued authorizing a significant increase in emissions from an existing source, the permit must require the installation and operation of best available control technology ("BACT") for reducing emissions. Further, *before* a PSD permit may be issued the polluter proposing the modification must demonstrate that any increase in emissions, after the installation and operation of BACT, will not adversely impact human health or welfare or any Class I areas such as the Great Smoky Mountains and Shenandoah National Parks.

All of your coal-fired power plants identified below are existing sources of air pollution at which you have undertaken major modifications without first obtaining PSD permits and thereafter installing and operating BACT.

Furthermore, some of the plants identified above are located in areas that are not attaining the NAAQS. *Before* making major modifications to those plants, Part D of the Clean Air Act (42 U.S.C. § 7501-7515) required you to comply with the permitting requirements that apply in nonattainment areas. These requirements, often referred to as the "nonattainment NSR" program, are designed to ensure a net reduction in the emission of air pollutants in areas that have not attained the NAAQS so that the air quality in these areas improves. To obtain a nonattainment NSR permit, the proponent of a new or modified source must install air pollution controls that meet the "lowest achievable emission rate" ("LAER"), must obtain federally enforceable emission offsets at least as great as the new or modified source's emissions, must certify that all other major sources that it owns or operates within the state are in compliance with the CAA, and must demonstrate that the benefits of the proposed modification significantly outweigh the environmental and social costs imposed as a result of its construction or modification. As we set out below, you have also violated the Clean Air Act by making major modifications at coal-fired power plants you operate without obtaining the required nonattainment NSR permits.

Finally, the Clean Air Act requires that if you make any modifications to your plants that are not considered "major," you are still required to obtain a general or "minor" new source review ("NSR") permit regardless of the plant's location. You have also violated this requirement on numerous occasions.

Congress has provided states with the opportunity to implement certain requirements of the Clean Air Act through federally enforceable regulations known as State Implementation Plans ("SIPs"). The SIPs for Tennessee, Kentucky, and Alabama, the states in which you operate your coal-fired power plants, all contain, in whole or in part, the PSD and nonattainment NSR requirements discussed above. To the extent these states have not adopted these requirements, their SIPs are supplemented by the federal regulations described above.

B. The Violations

Each of the violations discussed below began on the day you commenced construction of the modification and will continue every day until you obtain the appropriate PSD/NSR permit and operate the necessary pollution control equipment to satisfy the SIP requirements.

1. Allen Unit 3

Since 1992 you have been in violation of the Clean Air Act every day after making numerous unpermitted modifications to your Allen Unit 3 power plant. In particular, you made "major modifications" to this facility as that term is defined by the Tennessee SIP, Tennessee Air Pollution Control Regulation and Memphis-Shelby Air Pollution Control Regulation, Article I, Division IV, 16-77, S1200-3-9-.01(4)(b)(2), through a significant overhaul of this unit in 1992 that included, but is not limited to, replacement of the horizontal reheater with a redesigned reheater. To complete this project, you built a railroad track from the platform into the building for the movement of reheater elements. You also reinforced the building's structural steel in order to support the additional weight. You also constructed a monorail system inside the boiler to move reheater elements in and out, and built a trolley for the railroad track to run between the boiler and an outside platform. These changes created the potential for, and/or resulted in a significant net emissions increase of SO_2 and NO_x . You performed such work without first obtaining a PSD permit. Further, since 1992 you have operated this unit without a PSD permit.

Accordingly, you violated and remain in violation of Tennessee Air Pollution Control Regulation and Memphis-Shelby Air Pollution Control Regulation, Article I, Division IV, 16-77, S1200-3-9-.01(4) by making these modifications without first obtaining a PSD permit, without first installing BACT, without first meeting other PSD program requirements that are in the Tennessee SIP, and by continuing to operate this unit without complying with such requirements. Further, you violated and remain in violation of Tennessee Air Pollution Control Regulation and Memphis-Shelby Air Pollution Control Regulation, Article I, Division IV, 16-77, S1200-3-9-.01(1) by making these modifications without first obtaining a minor NSR permit.

2. Bull Run

Since 1988 you have been in violation of the Clean Air Act every day after making numerous unpermitted modifications to your single unit at Bull Run. In particular you made "major modifications" to this facility, as that term is defined by the Tennessee SIP, Tennessee Air Pollution Control Regulation 1200-3-9-.01(4)(b)(2), through a significant overhaul of this unit in 1988 that included, but is not limited to, replacement of the secondary superheater outlet pendant elements and replacement of all economizer elements in the "A" and "B" furnace. This project led you to replace more than 58,000 feet of tubing in the boiler, about 26.5% of the total tubing in the boiler. These changes created the potential for, and/or resulted in a significant net emissions increase of SO_2 , NO_x , and particulate matter. You performed such work without first obtaining a PSD permit. Further, since 1988 you have operated this unit without a PSD permit.

Accordingly, you violated and remain in violation of Tennessee Air Pollution Control Regulation 1200-3-9-.01(4) by making these modifications to Bull Run without first obtaining a PSD permit, without first installing BACT, without first meeting other PSD program requirements that are in the Tennessee SIP, and by continuing to operate this unit without complying with such requirements. Further, you violated and remain in violation of Tennessee Air Pollution Control Regulation 1200-3-9-.01(1) by making these modifications without first obtaining a minor NSR permit.

3. Cumberland Units 1 and 2

Since 1996, you have been in violation of the Clean Air Act every day after making numerous unpermitted modifications to your Cumberland Units 1 and 2. In particular, you made "major modifications," as that term is defined by the Tennessee SIP, Tennessee Air Pollution Control Regulation 1200-3-9-.01(4)(b)(2), to Cumberland Unit 1 in 1996 and Cumberland Unit 2 in 1994 through a significant overhaul of these units that included, but is not limited to, the replacement and redesign of their respective secondary superheater outlet headers, replacement of their secondary superheater pendant elements and replacement of their lower waterwalls. These changes created the potential for, and/or resulted in a significant net emissions increase of SO₂, NO_x and particulate matter. You performed such work without first obtaining PSD permits. Further, since 1988 you have operated these units without PSD permits.

Accordingly, you violated and remain in violation of Tennessee Air Pollution Control Regulation 1200-3-9-.01(4) by making these modifications to Cumberland Units 1 and 2 without first obtaining PSD permits, without first installing BACT, without first meeting other PSD program requirements that are in the Tennessee SIP, and by continuing to operate these units without complying with such requirements. Further, you violated and remain in violation of Tennessee Air Pollution Control Regulation 1200-3-9-.01(1) by making these modifications without first obtaining minor NSR permits.

4. Kingston Units 6 and 8

Since 1990, you have been in violation of the Clean Air Act every day after making numerous unpermitted modifications at Kingston Units 6 and 8. In particular, you made "major modifications," as that term is defined by the Tennessee SIP, Tennessee Air Pollution Control Regulation 1200-3-9-.01(4)(b)(2), to Kingston Unit 6 in 1989-90 and Kingston Unit 8 in 1990 through a significant overhaul of these units that included, but is not limited to, the replacement of all superheater crossover tubes, lower horizontal and side waterwall tubes of the superheat and reheat furnace and the replacement of all superheater intermediate pendant elements and all reheater intermediate pendant elements. These changes created the potential for, and/or resulted in a significant net emissions increase of SO₂ and NO_x at both units. These changes also created the potential for, and/or resulted in a significant net emissions increase of particulate matter at Unit 8. You performed such work without first obtaining PSD permits. Further, since 1990 you have operated these units without PSD permits.

Accordingly, you violated and remain in violation of Tennessee Air Pollution Control Regulation 1200-3-9-.01(4) by making these modifications to Kingston Units 6 and 8 without first obtaining PSD permits, without first installing BACT, without first meeting other PSD program requirements that are in the Tennessee SIP; and by continuing to operate this unit without complying with such requirements. Further, you violated and remain in violation of Tennessee Air Pollution Control Regulation 1200-3-9-.01(1) by making these modifications without first obtaining minor NSR permits.

5. John Sevier Unit 3

Since 1986, you have been in violation of the Clean Air Act every day after making numerous unpermitted modifications at John Sevier Unit 3. In particular, in 1986, you made "major modifications," as that term is defined by the Tennessee SIP, Tennessee Air Pollution Control Regulation 1200-3-9-.01(4)(b)(2), at John Sevier Unit 3 through a significant overhaul of this unit that included, but is not limited to, the replacement of all waterwall tubes in front, rear, and sidewalls of both furnaces, replacement of all burner tube panels in both furnaces, and replacement of superheater platen elements. These changes created the potential for, and/or resulted in a significant net emissions increase of SO₂ and NO_x. You performed such work without first obtaining a PSD permit. Further, since 1990 you have operated this unit without a PSD permit.

Accordingly, you violated and remain in violation of Tennessee Air Pollution Control Regulation 1200-3-9-.01(4) by making these modifications to John Sevier Unit 3 without first obtaining a PSD permit, without first installing BACT, without first meeting other PSD program requirements that are in the Tennessee SIP, and by continuing to operate these units without complying with such requirements. Further, you violated and remain in violation of Tennessee Air Pollution Control Regulation 1200-3-9-.01(1) by making these modifications without first obtaining a minor NSR permit.

6. Paradise Units 1, 2, and 3

Since 1984, you have been in violation of the Clean Air Act every day after making numerous unpermitted modifications at Paradise Unit 1, 2, and 3. In particular, you made "major modifications," as that term is defined in the federal PSD rules and in the Kentucky SIP, through a significant overhaul of these units in 1984 and 1985 that included, but is not limited to, the replacement and redesign of the cyclone burners and lower furnace walls, including headers and floors for Paradise Units 1, 2, and 3. Specifically, you replaced all fourteen cyclone burners at each of Units 1 and 2 and replaced all twenty-three cyclone burners at Unit 3. In addition, you cut out and replaced significant portions of the waterwall at Units 1, 2, and 3. The magnitude of the work required you to construct monorails at the front and rear walls for lifting and positioning the cyclones at each unit. You also installed a trolley system to transport the cyclones in and out of the building and constructed rigging inside the furnace to assist in attaching the wall panels and floor panels. These changes created the potential for, and/or resulted in a significant net emissions increase of particulate matter, SO₂, and NO_x. You performed such work without first obtaining

PSD and NSR permits. Further, since 1990 you have operated these units without PSD or NSR permits.

Accordingly, you violated and remain in violation of the federal PSD rules at 40 C.F.R. § 52.21 by making these modifications without first obtaining PSD permits, without first installing BACT, without first meeting other PSD program requirements that are in the Kentucky SIP, and by continuing to operate these units without complying with such requirements. You also violated and remain in violation of the Kentucky SIP NSR rules at 401 KAR 51:050 (45 Fed. Reg. 6092) by making these modifications without first obtaining NSR permits, without installing LAER, without first meeting other NSR program requirements that are in the Kentucky SIP, and by continuing to operate these units without complying with such requirements.

7. Shawnee Units 1 and 4

Since 1989, you have been in violation of the Clean Air Act every day after making numerous unpermitted modifications at Shawnee Units 1 and 4. In particular, you made "major modifications," as that term is defined in the federal PSD rules and in the Kentucky SIP, through a significant overhaul of these units in 1989 and 1990 that included, but is not limited to, the replacement and redesign of the secondary superheater and reheater pendant and crossover elements including header stubs. These changes created the potential for, and/or resulted in a significant net emissions increase of SO₂, NO_x, and particulate matter. You performed such work without first obtaining PSD permits. Further, since 1989 and 1990 you have operated these units without PSD permits.

Accordingly, you violated and remain in violation of the federal PSD rules at 40 C.F.R. § 52.21 and, beginning October 2, 1989, the state PSD rules at 401 KAR 51:017 by making these modifications without first obtaining a PSD permit, without first installing BACT, without first meeting other PSD program requirements that are in the Kentucky SIP,² and by continuing to operate these units without complying with such requirements.

8. Colbert Unit 5

Since 1982, you have been in violation of the Clean Air Act every day after making numerous unpermitted modifications at Colbert Unit 5. In particular, you made "major modifications" as that term has been defined in the Alabama SIP, through a significant overhaul of this unit in 1982 that included, but is not limited to, the replacement and redesign of the

² For the 1989 project outage at Shawnee Unit 1, the applicable regulations include definitions, 401 KAR 50:010, which were incorporated into the federally approved Kentucky SIP on December 4, 1986 (51 Fed. Reg. 43,472), and became effective January 5, 1987. For the 1990 project outage at Shawnee Unit 4, the applicable regulations include revised definitions, 401 KAR 50:010, which were incorporated into the federally approved Kentucky SIP on November 28, 1989 (54 Fed. Reg. 48,887), and became effective January 29, 1990.

waterwalls and horizontal reheater, modified the startup system, modified the superheater by adding wingwalls in the furnace, replaced the gas proportioning dampers, replaced the windbox, redesigned and replaced the control system, and added a balanced draft conversion system. These changes created the potential for, and/or resulted in a significant net emissions increase of particulate matter and NO_x. These changes also resulted in an increase in the potential emission rate above 100 tons per year of SO₂. You performed such work without first obtaining a PSD or NSR permit. Further, since 1990 you have operated this unit without a PSD or NSR permit.

Accordingly, you violated and remain in violation of the applicable Alabama PSD rule³ by making these modifications without first obtaining a PSD permit, without first installing BACT, without first meeting other PSD program requirements that are in the Alabama SIP, and by continuing to operate this unit without complying with such requirements. You also violated and remain in violation of the applicable Alabama NSR rule⁴ by making these modifications without first obtaining an NSR permit, without installing LAER, without first meeting other NSR program requirements, and by continuing to operate these units without complying with such requirements. You also violated the Alabama minor source construction permit rule, ADEM Regulation 16.1.1, which was incorporated into the federally approved Alabama SIP on November 26, 1979 (44 Fed. Reg. 67,375), and became effective November 26, 1979.⁵

9. Widows Creek Unit 5

Since 1989, you have been in violation of the Clean Air Act every day after making numerous unpermitted modifications at Widows Creek Unit 5. In particular, you made "major modifications" as that term has been defined in the Alabama SIP, through a significant overhaul of this unit in 1989 that included, but is not limited to, the replacement and redesign of all of the secondary superheater pendant elements, reheater elements, and crossover elements. Additionally, you redesigned the tubing to use different materials, ultimately replacing approximately 43% of the tubing in the boiler. These changes created the potential for, and/or resulted in a significant net emissions increase of SO₂ and NO_x. You performed such work without first obtaining a PSD and NSR permit. Further, since 1990 you have operated this unit without a PSD or NSR permit.

³ ADEM Regulation 16.4, which was incorporated into the federally approved Alabama SIP on November 10, 1981 (46 Fed. Reg. 55,517), and became effective December 10, 1981.

⁴ ADEM Regulation 16.3.2, which was incorporated into the federally approved Alabama SIP on June 3, 1980 (45 Fed. Reg. 37,430), and became effective June 3, 1980.

⁵ Definitions related to the sections discussed in this paragraph were incorporated into the federally approved Alabama SIP on May 31, 1972 (37 Fed. Reg. 10,842), and became effective May 31, 1972.

Accordingly, you violated and remain in violation of the applicable Alabama PSD rule⁶ by making these modifications without first obtaining a PSD permit, without first installing BACT, without first meeting other PSD program requirements that are in the Alabama SIP, and by continuing to operate this unit without complying with such requirements. You also violated and remain in violation of the applicable Alabama NSR rule⁷ by making these modifications without first obtaining an NSR permit, without installing LAER, without first meeting other NSR program requirements, and by continuing to operate this unit without complying with such requirements. By failing to obtain and thereafter comply with a construction permit you are also in violation of the Alabama minor source construction permit rule, ADEM Regulation 16.1.1, approved in the Alabama SIP on August 28, 1985 (50 Fed. Reg. 34,804), effective October 28, 1985.⁸

II. NSPS VIOLATIONS AT COLBERT UNIT 5

In addition to the violations set forth above, you also violated regulations known as New Source Performance Standards ("NSPS") at Colbert Unit 5. Pursuant to Section 111 of the Clean Air Act, 42 U.S.C. § 7411, EPA has promulgated standards of performance for a variety of major air pollution source categories, including electric utility steam generating units. These standards apply to the owner or operator of any electric utility steam generating unit, "the construction or modification of which is commenced after the date of publication . . . of any standard . . . applicable to that facility." 40 C.F.R. § 60.1(a) and §§ 60.40a-49a (Subpart Da). The changes you made to Colbert Unit 5 in 1983 that are discussed above caused an increase in the maximum hourly emissions rate achievable by the unit and therefore constituted a "modification" as that term is defined at 40 C.F.R. §§ 60.2 and 60.14(a). Accordingly, beginning in 1983, you were required to meet all of the requirements of Subpart Da, and you have failed every day thereafter to do so.

III. OPACITY VIOLATIONS AT THE JOHNSONVILLE FOSSIL PLANT

In your operation of the Johnsonville facility, you have regularly violated for at least the last five years the 20 percent opacity limit in the Tennessee SIP (40 C.F.R. § 52.2220 et seq.;

⁶ ADEM Regulation 16.4, was incorporated into the federally approved Alabama SIP on August 28, 1985 (50 Fed. Reg. 34,804), and became effective October 28, 1985.

⁷ ADEM Regulation 16.3.2, which was incorporated into the federally approved Alabama SIP on March 9, 1983 (48 Fed. Reg. 9859), effective April 8, 1983, and subsequently revised on two occasions: (1) February 10, 1986 (51 Fed. Reg. 4908) (adding visibility provisions), effective April 11, 1986, and (2) July 29, 1987 (52 Fed. Reg. 23,253) (adding section 16.3.3, stack height provisions), effective September 28, 1987.

⁸ Definitions related to the sections discussed in this paragraph were incorporated into the federally approved Alabama SIP on April 23, 1974 (39 Fed. Reg. 14,338, and became effective May 23, 1974.

TAPCR 1200-3-5-.01(1)). You continue regularly to violate such limit. You have also regularly violated for at least the last five years the requirement in the Tennessee SIP to submit, on a quarterly basis, complete reports of all of your opacity readings in excess of 20 percent. (40 C.F.R. § 52.2220 et seq.; TAPCR 1200-3-10-.02 (2)(b)). You continue regularly to violate such requirement.

IV. CONCLUSION

Your civil penalty liability for these violations is at least for the last five years. You are responsible for employing practices to prevent such violations, and you are responsible for implementing measures immediately to prevent further violations. Air pollution control technologies to prevent such violations have been, and continue to be, readily available. Although not necessary to sustain a cause of action, the suit will also allege that your violations have contributed to the unnecessary degradation of air quality in Tennessee, Kentucky, and Alabama, and the impairment of visibility and other air quality related values in the Great Smoky Mountains National Park, Shenandoah National Park, and other Class I areas.

The address of NPCA is 1300 Nineteenth Street, NW, Suite 300, Washington, DC 20036. NPCA has individual members who have been, and continue to be, injured by the excessive and unlawful emissions from the above-mentioned facilities. If you have any questions regarding the allegations in this notice, believe any of the foregoing information to be in error, or wish to discuss a settlement of this matter prior to the initiation of litigation, please contact any one of the attorneys below.

Yours Sincerely,

REED ZARS
Reed Zars
Attorney at Law
2020 Grand Avenue, #522
Laramie, WY 82070
307-745-7979

GEORGE HAYS ⁹⁴²
George Hays
Attorney at Law
236 West Portal Ave., #110
San Francisco, CA 94127
415-716-9159

WILLIAM MOORE ³⁴²
William J. Moore, III
Henrichsen Siegel Moore
200 East Forsyth Street
Jacksonville, Florida 32202
904-355-2233

pc: by certified mail:

Carol Browner
Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

John Hankinson
Regional Administrator
EPA Region 4
Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303-3104

Governor Don Siegelman
State Capitol
Room N-104
600 Dexter Avenue
Montgomery, AL 36130

James E. Bickford
Secretary
Kentucky Natural Resources and
Environmental Protection Cabinet
Capitol Plaza Tower
Frankfort, KY 40601

Governor Paul E. Patton
Governor's Office
700 Capitol Avenue
Frankfort, KY 40601

Governor Don Sundquist
Office of the Governor
State Capitol
Nashville, TN 37243-3104

Milton H. Hamilton, Jr.
Commissioner
Tenn. Dept. of Env't. & Conservation
21st Floor, L&C Tower
401 Church Street
Nashville, TN 37243

James W. Warr
Director
Alabama Dept. of Environmental Mgmt.
P.O. Box 301463
Montgomery, AL 36130-1463

John E. Hornback
Director, Division for Air Quality
Kentucky Dept. of Environmental Protection
803 Schenkel Lane
Frankfort, KY 40601-1403

Sender Information

Name : Mr. Reed Zars
Street1 : 2020 Grand Avenue
Street2 : Suite 522
CSZ : Laramie, WY 82070
Salutation : Dear Mr. Zars:

EXHIBIT 9
TO DEFENDANTS'
MEMORANDUM OF LAW
IN SUPPORT OF MOTION
FOR PROTECTIVE
ORDER

REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

[illegible]

#15915

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:

Tennessee Valley Authority

Paradise, Colbert, Widows
Creek, Allen, Cumberland,
Bull Run, John Sevier,
Shawnee and Kingston
Plants

Respondent

)
) Docket No. CAA-04-2000-0008
)

) NOTICE OF VIOLATION
) Clean Air Act Section 113(a) (1)
) 42 U.S.C. § 7413(a) (1)
)
)
)
)
)

NOTICE OF VIOLATION

This Notice of Violation ("NOV") is issued to the Tennessee Valley Authority ("TVA"), and TVA'S operators at its plants in Drakesboro and Paducah, Kentucky; Tuscumbia and Stevenson, Alabama; and Memphis, Cumberland City, Clinton, Rogersville and Kingston, Tennessee; for violations of the Clean Air Act ("the Act") at all the coal-fired power plants identified below. TVA has embarked on a program of modifications intended to extend the useful life, regain lost generating capacity and/or increase capacity at their coal-fired power plants.

Commencing at various times since 1977 and continuing to today, TVA has modified and operated the coal-fired power plants identified below without obtaining New Source Review ("NSR") permits authorizing the construction and operation of physical modifications of its boiler units as required by the Act. In addition, for each physical modification at these power plants, TVA has operated these modifications without installing pollution control equipment required by the Act. These violations of the Act and the State Implementation Plans ("SIP") of Tennessee, Kentucky and Alabama have resulted in the release of massive amounts of Sulfur Dioxides (SO₂), Nitrogen Oxides (NO_x), and particulate matter ("PM") into the environment. Until these violations are corrected, TVA will continue to release massive amounts of illegal SO₂, NO_x, and PM into the environment.

This NOV is issued pursuant to Section 113(a) (1) of the Act, as amended, 42 U.S.C.A. Sections 7401-7671q. Section 113(a) of

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the Act requires the Administrator of the United States Environmental Protection Agency ("EPA") to notify any person in violation of a state implementation plan or permit of the violations. The authority to issue this NOV has been delegated to the Regional Administrator, EPA Region 4.

STATUTORY AND REGULATORY BACKGROUND

1. When the Act was passed, Congress exempted existing facilities from many of its requirements. However, Congress also made it quite clear that this exemption would not last forever. As the United States Court of Appeals for the D.C. Circuit explained in Alabama Power v. Costle, 636 F.2d 323 (D.C. Cir. 1979), "the statutory scheme intends to 'grandfather' existing industries; but...this is not to constitute a perpetual immunity from all standards under the PSD program." Rather, the Act requires grandfathered facilities to install modern pollution control devices whenever the unit is proposed to be modified in such a way that its emissions may increase.
2. The NSR provisions of Parts C and D of Title I of the Act require preconstruction review and permitting for modifications of stationary sources. Pursuant to applicable regulations, if a major stationary source is planning upon making a major modification, then that source must obtain either a Prevention of Significant Deterioration (PSD) permit or a nonattainment NSR permit, depending on whether the source is located in an attainment or a nonattainment area for the pollutant being increased above the significance level. If a major stationary source is planning on making a modification that is not major, it must obtain a general or "minor" NSR permit regardless of its location. To obtain the required permit, the source must agree to put on the best available control technology ("BACT") for an attainment pollutant or achieve the lowest achievable emission rate ("LAER") in a nonattainment area, or, in the case of a modification that is not major, must meet the emission limit called for under the applicable minor NSR program.
3. Pursuant to the Act, the SIP of Kentucky requires that no construction or operation of a modification of a major stationary source occur without first obtaining a permit. See for PSD permits in attainment areas, 40 C.F.R. § 52.21, and Kentucky Air Regulations 401 KAR 51:017, section 8(1-3), which is part of the Kentucky SIP, 54 Fed. Reg. 36,307 (September 1, 1989), and revised 59 Fed. Reg. 32,343 (June 23, 1994); for NSR permits in nonattainment areas, 401 KAR

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51:050, which was part of the Kentucky SIP, 45 Fed. Reg. 6092 (January 25, 1980), and later revised at 401 KAR 51:052, which is part of the Kentucky SIP, 59 Fed. Reg. 32,343 (June 23, 1994); and for minor modifications regardless of attainment status, 401 KAR 50:035, which is part of the Kentucky SIP, 45 Fed. Reg. 6092 (January 25, 1980), and revised at 55 Fed. Reg. 4169 (February 7, 1990) and again at 60 Fed. Reg. 49778 (September 27, 1995).

4. Pursuant to the Act, the SIP of Alabama requires that no construction or operation of a modification of a major stationary source occur without first obtaining a permit. See for PSD permits in attainment areas, 40 C.F.R. § 51.166(i), and Alabama Department of Environmental Management Code 335-3-14-.04(8), which is part of the Alabama SIP that was approved by EPA on March 9, 1983 (48 Fed. Reg. 9860); for NSR permits in nonattainment areas, Alabama Department of Environmental Management Code 335-3-14-.05, which is part of the Alabama SIP that was approved by EPA on November 10, 1981 (46 Fed. Reg. 55518), as amended on December 28, 1987 (52 Fed. Reg. 48812); and for minor modifications regardless of attainment status, Alabama Department of Environmental Management Code 335-3-14-.01, which is part of the Alabama SIP that was approved by EPA on November 10, 1981 (46 Fed. Reg. 55518), as amended on December 28, 1987 (52 Fed. Reg. 48812).
5. Pursuant to the Act, the SIP of Tennessee requires that no construction or operation of a modification of a major stationary source occur without first obtaining a permit. See for PSD permits in attainment area, 40 C.F.R. § 51.166(i), and Tennessee Air Pollution Control Regulation 1200-3-9-.01(4), which is part of the Tennessee SIP that was approved by EPA on May 31, 1972 (37 Fed. Reg. 10840), as amended on February 26, 1985 (50 Fed. Reg. 7777), and on July 29, 1996 (61 Fed. Reg. 39332); and Memphis-Shelby Air Pollution Control Regulation Article I, Division IV, Section 16-77 that was approved by EPA on June 15, 1989 (54 Fed. Reg. 25456).

For NSR permits in nonattainment areas, Tennessee Air Pollution Control Regulation 1200-3-9-.01(5), which is part of the Tennessee SIP that was approved by EPA on May 31, 1972 (37 Fed. Reg. 10840), as amended on June 7, 1979 (44 Fed. Reg. 32681), June 24, 1982 (47 Fed. Reg. 27267) and on February 10, 1995 (60 Fed. Reg. 7913); and Memphis-Shelby Air Pollution Control Regulation Article I, Division IV, Section 16-77 that was approved by EPA on June 15, 1989 (54 Fed. Reg. 25456).

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For minor modifications regardless of attainment status, Tennessee Air Pollution Control Regulation 1200-3-9-.01(1), which is part of the Tennessee SIP that was approved by EPA on May 31, 1972 (37 Fed. Reg. 10840), as amended on February 26, 1985 (50 Fed. Reg. 7779), and on July 18 and 29, 1996 (61 Fed. Reg. 37387 and 39332); and Memphis-Shelby Air Pollution Control Regulation Article I, Division IV, Section 16-77 that was approved by EPA on June 15, 1989 (54 Fed. Reg. 25456).

6. The SIP provisions identified in paragraphs 3-5 above are all federally enforceable pursuant to Sections 110 and 113 of the Act.

FACTUAL BACKGROUND

7. TVA operates the Paradise Steam Plant, a fossil fuel-fired electric utility steam generating plant located in Muhlenburg County, Drakesboro, Kentucky. The plant consists of 3 boiler units with a total generating capacity of 2558 megawatts and began operation in 1963.

8. The Paradise Plant is located in an area that has the following attainment/nonattainment classifications from 1980 to the present:

For NO₂, the area has been classified as attainment from 1980 to the present;

For SO₂, the area where has been classified as nonattainment from 1980 to 1998. The area has been reclassified as attainment from 1998 to the present;

For ozone, the area has been classified as attainment from 1980 to the present;

For Total Suspended Particulates (TSP), the area has been classified as nonattainment from 1980 to 1987.

For PM, the area has been classified as attainment from 1987 to present.

9. TVA operates the Shawnee Steam Plant, a fossil fuel-fired electric utility steam generating plant located in McCracken County, Paducah, Kentucky. The plant consists of 10 boiler units with a total generating capacity of 1750 megawatts and began operation in 1953.

10. The Shawnee Plant is located in an area that has the following attainment/nonattainment classifications from 1980 to the present:

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For NO₂, the area has been classified as attainment from 1980 to the present;
 For SO₂, the area had been classified as nonattainment from 1980 to May 1982. The area has been classified as attainment from May 1982 to the present; and,
 For ozone, the area has been classified as attainment from 1980 to the present.
 For TSP, the area had been classified as nonattainment from 1980 to 1987. For PM, the area has been classified as attainment from 1987 to present.

11. TVA operates the Colbert Steam Plant, a fossil fuel-fired electric utility steam generating plant located in Colbert County, Tuscumbia, Alabama. The plant consists of 5 boiler units with a total generating capacity of 1350 megawatts and began operation in 1955.
12. TVA operates the Widows Creek Steam Plant, a fossil fuel-fired electric utility steam generating plant located in Jackson County, Stevenson, Alabama. The plant consists of 8 boiler units with a total generating capacity of 1968 megawatts and began operation in 1952.
13. The Colbert and Widows Creek Plants are located in areas that has the following attainment/nonattainment classifications from 1980 to the present:

For NO₂, Jackson and Colbert Counties have been classified as attainment from 1980 to the present;
 For ozone, Jackson and Colbert Counties have been classified as attainment from 1980 to the present; and,
 For SO₂ in Jackson County, where the Widows Creek Plant is located, the area had been classified as nonattainment from 1980 to 1990. The area has been reclassified as attainment from 1990 to the present.
 For SO₂ in Colbert County, where the Colbert Plant is located, the area was nonattainment between 1980-1993. The area has been reclassified as attainment from 1993 to the present.
 For TSP in Jackson County, where the Widows Creek Plant is located, the area had been classified as nonattainment from 1980 to 1987. For PM, the area has been classified as attainment from 1987 to present.
 For TSP and PM in Colbert County, where the Colbert Plant is located, the area has been classified as attainment from 1980 to present.

14. TVA operates the Allen Steam Plant, a fossil fuel-fired electric utility steam generating plant located in Shelby

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County, Memphis, Tennessee. The plant consists of 3 boiler units with a total generating capacity of 990 megawatts and began operation in 1959.

15. The Allen Plant is located in an area that has the following attainment/nonattainment classifications from 1980 to the present:

For NO₂, the area has been classified as attainment from 1980 to the present;

For SO₂, the area has been classified as attainment from 1980 to the present; and,

For ozone, the area had been classified as nonattainment between January 1980 and January 1995. The area has been classified as attainment from February 1995 to the present.

For TSP and PM, the area has been classified as attainment from 1980 to present.

16. TVA operates the Cumberland Steam Plant, a fossil fuel-fired electric utility steam generating plant located in Stewart County, Cumberland City, Tennessee. The plant consists of 2 boiler units with a total generating capacity of 2600 megawatts and began operation in 1973.
17. TVA operates the Bull Run Steam Plant, a fossil fuel-fired electric utility steam generating plant located in Anderson County, Clinton, Tennessee. The plant consists of 1 boiler unit with a total generating capacity of 950 megawatts and began operation in 1967.
18. TVA operates the John Sevier Steam Plant, a fossil fuel-fired electric utility steam generating plant located in Hawkins County, Rogersville, Tennessee. The plant consists of 4 boiler units with a total generating capacity of 800 megawatts and began operation in 1955.
19. The Cumberland, Bull Run and John Sevier Plants are located in areas that have the following attainment/nonattainment classifications from 1980 to the present:

For Stewart, Anderson, and Hawkins Counties :

For NO₂, the area has been classified as attainment from 1980 to the present;

For SO₂, the area has been classified as attainment from 1980 to the present; and,

For ozone, the area has been classified as attainment from 1980 to the present.

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For TSP in Anderson County, where the Bull Run Plant is located, the area had been classified as nonattainment from 1980 to 1982. For PM, the area has been classified as attainment from 1982 to present. For TSP and PM in Stewart and Hawkins Counties, where the Cumberland and John Sevier Plants are located, the area has been classified as attainment from 1980 to present.

20. TVA operates the Kingston Steam Plant, a fossil fuel-fired electric utility steam generating plant located in Roane County, Kingston, Tennessee. The plant consists of 9 boiler units with a total generating capacity of 1700 megawatts and began operation in 1954.
21. The Kingston plant is located in an area that has the following attainment/nonattainment classifications from 1980 to the present:

For NO₂, the area has been classified as attainment from 1980 to the present;
For SO₂, the area has been classified as attainment from 1980 to the present; and,
For ozone, the area had been classified as nonattainment from 1980 to March 1990. The area has been classified as attainment from March 1990 to the present.
For TSP and PM, the area has been classified as attainment from 1980 to the present.
22. Each of the plants identified in paragraphs 7-21 above emits or has the potential to emit at least 100 tons per year of NO₂, SO₂ and/or PM and is a stationary source under the Act.

VIOLATIONS

A. Kentucky Plants Paradise and Shawnee Plants

23. On numerous occasions between 1979 and the date of this Notice, TVA has made "modifications" to the Paradise Plant as defined by 40 C.F.R. § 52.21(b) and 401 KAR 51:017 and 401 KAR 51:050 Section 2(3), and revised at 401 KAR 51:052. These modifications include those in 1985 and 1986 when Units 1, 2 and 3 each had the cyclones, lower walls and flooring replaced.
24. For each of the modifications that occurred at the Paradise Plant, TVA failed to obtain a PSD permit pursuant to 40

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C.F.R. 52.21(i) and 401 KAR 51:017 from 1989 to present; a nonattainment NSR permit pursuant to 401 KAR 51:050 and 51:052, or a minor NSR permit pursuant to Kentucky Air Regulations 401 KAR 50:035, Section 3. In addition, for modifications after 1992, no information was provided to the permitting agency of actual emission after the modification as required by 40 C.F.R. § 52.21(b)(2)(v) and 401 KAR 51:050, and later revised at 401 KAR 51:052.

25. On numerous occasions between 1979 and the date of this Notice, TVA has made "modifications" to the Shawnee Plant as defined by 401 KAR 51:017 Section 1(23). These modifications include those in 1989 and 1990 when Units 1 and 4 each had secondary superheater and reheater pendant elements replaced.
26. For each of the modifications that occurred at the Shawnee Plant, TVA failed to obtain a PSD permit pursuant to 401 KAR 51:017 or a minor NSR permit pursuant to Kentucky Air Regulations 401 KAR 50:035, Section 3. In addition, for modifications after 1992, no information was provided to the permitting agency of actual emission after the modification as required by 40 C.F.R. § 52.21(b)(2)(v) and 401 KAR 51:017.
27. None of these modifications fall within the "routine maintenance, repair and replacement" exemption found at 40 C.F.R. § 52.21(b)(2)(iii) and 401 KAR 51:017 Section 1(23) and 401 KAR 51:050, later revised at 401 KAR 51:052. Each of these changes was an expensive capital expenditure performed infrequently at the plant that constituted the replacement and/or redesign of a boiler component with a long useful life. In each instance, the change was performed to increase capacity, regain lost capacity, and/or extend the life of the unit. In many instances, the original component was replaced with a component that was substantially redesigned in a manner that increased emissions. That the "routine maintenance, repair and replacement" exemption does not apply where construction activity is at issue was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).
28. None of these modifications fall within the "increase in hours of operation or in the production rate" exemption found at 40 C.F.R. § 52.21(b)(2)(iii)(f), or 401 KAR 51:017,

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Section 1(23)(5) and 401 KAR 51:050 Section 2. This exemption is limited to stand-alone increases in operating hours or production rates, not where such increases follow or are otherwise linked to construction activity. That the hours of operation/rates of production exemption does not apply where construction activity is at issue was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld twice by the court of appeals, in 1989 and in 1990. Puerto Rican Cement Co. v. EPA, 889 F.2d 292 (1st Cir. 1989); Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).

29. None of the modifications fall within the "demand growth" exemption found at 40 C.F.R. Section 52.21(b)(33)(ii) or Kentucky Air Regulations 401 KAR 51:050, and revised at 401 KAR 51:052, because for each modification a physical change was performed which resulted in the emissions increase.
30. Each of these modifications at the Paradise and Shawnee Plants resulted in a net significant increase in emissions, as that term is defined at Kentucky Air Regulations 401 KAR 51:017, Section 1(23) and 401 KAR 51:050, later revised at 401 KAR 51:052, for NO₂, and SO₂ and/or PM.
31. Therefore, TVA violated and continues to violate 40 C.F.R. Section 52.21 and Kentucky SIP Rule Kentucky Air Regulations 401 KAR 51:017 for the prevention of significant deterioration; Kentucky Air Regulations 401 KAR 51:050, for preconstruction review for nonattainment areas; and/or Kentucky Air Regulations 401 KAR 51:052 by constructing and operating modifications at the Paradise and Shawnee plants without the necessary permit required by the Kentucky SIP.
32. Each of these violations exists from the date of start of construction of the modification until the time that TVA obtains the appropriate NSR permit and operates the necessary pollution control equipment to satisfy the Kentucky SIP.

B. Alabama Power Plants
Colbert and Widows Creek Plants

33. On numerous occasions between 1979 and the date of this Notice, TVA has made "modifications" of the Colbert Plant as defined by the Alabama SIP, Alabama Department of Environmental Management (ADEM) Code 335-3-14-.04(2)(b)(1).

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These modifications include rehabilitation and modification of the boiler, turbine, and controls, including replacement of the waterwalls and horizontal reheater and modification of the startup system, in 1982.

34. For each of the modifications that occurred at the Colbert Plant, TVA did not obtain a PSD permit pursuant to ADEM Code 335-3-14-.04, a nonattainment NSR permit pursuant to ADEM Code 335-3-14-.05, nor a minor NSR permit pursuant to ADEM Code 335-3-14-.01. In addition, for modifications after 1992, no information was provided to the permitting agency of actual emission after a modification as required by ADEM Code 335-3-14-.03.
35. On numerous occasions between 1979 and the date of this Notice, TVA made "modifications" of the Widows Creek Plant as defined by the Alabama SIP, ADEM Code 335-3-14-.04(2)(b)(1). These modifications included, but are not limited to, replacement of elements in the secondary and reheater superheaters and crossovers in Unit 5 in 1989.
36. For each of these modifications that occurred at the Widows Creek Plant, TVA did not obtain a PSD permit pursuant to ADEM Code 335-3-14-.04, a nonattainment NSR permit pursuant to ADEM Code 335-3-14-.05, nor a minor NSR permit pursuant to ADEM Code 335-3-14-.01. In addition, for modifications after 1992, no information was provided to the permitting agency of actual emissions after the modification as required by ADEM Code 335-3-14-.03.
37. The modifications at the Colbert and Widows Creek plants do not fall within the "routine maintenance, repair and replacement" exemption found at 40 C.F.R. § 52.21(b)(2)(iii), or ADEM Code 335-3-14-.04(8). Each of these changes was an expensive capital expenditure performed infrequently at the plant that constituted the replacement and/or redesign of a boiler component with a long useful life. In each instance, the change was performed to increase capacity, regain lost capacity, and/or extend the life of the unit. In many instances, the original component was replaced with a component that was substantially redesigned in a manner that increased emissions. That the "routine maintenance, repair and replacement" exemption does not apply where construction activity is at issue was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. Wisconsin

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Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).

38. None of these modifications fall within the "increase in hours of operation or in the production rate" exemption found at 40 C.F.R. § 52.21(b)(2)(iii)(f), or ADEM Code 335-3-14-.04(8). This exemption is limited to stand-alone increases in operating hours or production rates, not where such increases follow or are otherwise linked to construction activity. That the hours of operation/rates of production exemption does not apply where construction activity is at issue was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld twice by the court of appeals, in 1989 and in 1990. Puerto Rican Cement Co. v. EPA, 889 F.2d 292 (1st Cir. 1989); Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).
39. None of the modifications fall within the "demand growth" exemption found at 40 C.F.R. Section 52.21(b)(33)(ii) or ADEM Code 335-3-14-.03 because for each modification a physical change was performed which resulted in the emissions increase.
40. Each of the modifications at the Colbert and Widows Creek plants resulted in a net significant increase in emissions, as that term is defined in ADEM Code 335-3-14-.04(2)(w), for NO₂, SO₂ and/or PM.
41. Therefore, TVA violated and continues to violate 40 C.F.R. Section 52.21 and Alabama SIP Rule 335-3-14-04 for the prevention of significant deterioration; 40 C.F.R. Section 52.24 and Rule 335-3-14-.05 for preconstruction review for nonattainment areas; and/or Rule 335-3-14-.03 by constructing and operating modifications at the Colbert and Widows Creek plants without the necessary permit required by the Alabama SIP.
42. Each of these violations exists from the date of start of construction of the modification until the time that TVA obtains the appropriate NSR permit and operates the necessary pollution control equipment to satisfy the Alabama SIP.

C. Tennessee Plants

Allen, Cumberland, Bull Run, John Sevier and Kingston Plants

43. On numerous occasions between 1979 and the date of this Notice, TVA has made "modifications" of the Allen Steam

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Plant as defined by the Tennessee SIP, Tennessee Air Pollution Control Regulation and Memphis- Shelby Air Pollution Control Regulation at 1200-3-9-.01(4)(b)2. These modifications include replacement of the then existing reheater with a redesigned reheater, at Unit 3 in 1991-92.

44. For each of the modifications that occurred at the Allen Plant, TVA did not obtain a PSD permit pursuant to Tennessee Air Pollution Control Regulations and Memphis-Shelby Air Pollution Control Regulations at 1200-3-9-.01(4), a nonattainment NSR permit pursuant to Tennessee Air Pollution Control Regulations and Memphis-Shelby Air Pollution Control Regulations at 1200-3-9-.01(5), nor a minor NSR permit pursuant to Tennessee Air Pollution Control Regulations and Memphis-Shelby Air Pollution Control Regulations at 1200-3-9-.01(1). In addition, for modifications after 1992 no information was provided to the permitting agency of actual emission after a modification as required by Tennessee Air Pollution Control Regulations and Memphis-Shelby Air Pollution Control Regulations at 1200-3-9-.01.
45. On numerous occasions between 1979 and the date of this Notice, TVA made "modifications" of the Cumberland Plant as defined by the Tennessee SIP, Tennessee Air Pollution Control Regulation 1200-3-9-.01(4)(b)2. These modifications included, but are not limited to, replacement and redesign of front and rear secondary superheater outlet headers, replacement of the inlet terminal tubes and the main steam piping tee at Unit 1 in 1996 and Unit 2 in 1994.
46. For each of the modifications that occurred at the Cumberland Plant, TVA did not obtain a PSD permit pursuant to Tennessee Air Pollution Control Regulations 1200-3-9-.01(4) nor a minor NSR permit pursuant to Tennessee Air Pollution Control Regulations 1200-3-9-.01(1). In addition, for modifications after 1992 no information was provided to the permitting agency of actual emission after a modification as required by Tennessee Air Pollution Control Regulations 1200-3-9-.01.
47. On numerous occasions between 1979 and the date of this Notice, TVA made "modifications" of the Bull Run Plant as defined by the Tennessee SIP, Tennessee Air Pollution Control Regulation 1200-3-9-.01(4)(b)2. These modifications included, but are not limited to, replacement of the secondary superheater outlet pendant elements and replacement of all economizer elements in the "A" and "B" furnace at Unit 1 in 1988.

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48. For each of the modifications that occurred at the Bull Run Plant, TVA did not obtain a PSD permit pursuant to Tennessee Air Pollution Control Regulations 1200-3-9-.01(4) nor a minor NSR permit pursuant to Tennessee Air Pollution Control Regulations 1200-3-9-.01(1). In addition, for modifications after 1992 no information was provided to the permitting agency of actual emission after a modification as required by Tennessee Air Pollution Control Regulations 1200-3-9-.01.
49. On numerous occasions between 1979 and the date of this Notice, TVA made "modifications" of the John Sevier Plant as defined by the Tennessee SIP, Tennessee Air Pollution Control Regulation 1200-3-9-.01(4)(b)2. These modifications included, but are not limited to, replacement of all waterwall tubes in front, rear, and sidewalls of both furnaces, replacement of all burner tube panels in both furnaces, and replacement of superheater elements at Unit 3 in 1986.
50. For each of the modifications that occurred at the John Sevier Plant, TVA did not obtain a PSD permit pursuant to Tennessee Air Pollution Control Regulations 1200-3-9-.01(4), nor a minor NSR permit pursuant to Tennessee Air Pollution Control Regulations 1200-3-9-.01(1). In addition, for modifications after 1992 no information was provided to the permitting agency of actual emission after a modification as required by Tennessee Air Pollution Control Regulations 1200-3-9-.01.
51. On numerous occasions between 1979 and the date of this Notice, TVA made "modifications" of the Kingston Plant Unit as defined by the Tennessee SIP, Tennessee Air Pollution Control Regulation 1200-3-9-.01(4)(b)2. These modifications included, but are not limited to, replacement of all superheater crossover tubes, lower horizontal and side waterwall tubes of the superheat and reheat furnace, and replacement of all superheater intermediate pendant elements and all reheater intermediate pendant elements at Unit 6 in 1989 and/or Unit 8 in 1987 and 1990.
52. For each of the modifications that occurred at the Kingston, TVA did not obtain a PSD permit pursuant to Tennessee Air Pollution Control Regulations 1200-3-9-.01(4), a nonattainment NSR permit pursuant to Tennessee Air Pollution Control Regulations 1200-3-9-.01(5), nor a minor NSR permit pursuant to Tennessee Air Pollution Control Regulations 1200-3-9-.01(1). In addition, for modifications after 1992 no information was provided to the permitting agency of actual emission after a modification as required by

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Tennessee Air Pollution Control Regulations 1200-3-9-.01.

53. The modifications at the Allen, Cumberland, Bull Run, John Sevier, and Kingston plants do not fall within the "routine maintenance, repair and replacement" exemption found at 40 C.F.R. § 52.21(b)(2)(iii), or Tennessee Air Pollution Control Regulations 1200-3-9-.01(4)(b)(2)(i)(I). Each of these changes was an expensive capital expenditure performed infrequently at the plant that constituted the replacement and/or redesign of a boiler component with a long useful life. In each instance, the change was performed to increase capacity, regain lost capacity, and/or extend the life of the unit. In many instances, the original component was replaced with a component that was substantially redesigned in a manner that increased emissions. That the "routine maintenance, repair and replacement" exemption does not apply where construction activity is at issue was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).
54. None of these modifications fall within the "increase in hours of operation or in the production rate" exemption found at 40 C.F.R. § 52.21(b)(2)(iii)(f), or Tennessee Air Pollution Control Regulations 1200-3-9-.01(4)(b)(2)(i)(VI). This exemption is limited to stand-alone increases in operating hours or production rates, not where such increases follow or are otherwise linked to construction activity. That the hours of operation/rates of production exemption does not apply where construction activity is at issue was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld twice by the court of appeals, in 1989 and in 1990. Puerto Rican Cement Co. v. EPA, 889 F.2d 292 (1st Cir. 1989); Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).
55. Each of the modifications at the Allen, Cumberland, Bull Run, John Sevier and Kingston plants resulted in a net significant increase in emissions, as that term is defined in Tennessee Air Pollution Control Regulations 1200-3-9-.01(4)(b)(4), for NO₂, SO₂ and/or PM.
56. Therefore, TVA violated and continues to violate 40 C.F.R.

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Section 52.21 and Tennessee SIP Rule 1200-3-9-.01(4) for the prevention of significant deterioration; 40 C.F.R. Section 52.24 and Rule 1200-3-9-.01(5) for preconstruction review for nonattainment areas; and/or Rule 1200-3-9-.01(1) by constructing and operating modifications at the Allen, Cumberland, Bull Run, John Sevier and Kingston plants without the necessary permit required by the Tennessee SIP.

57. Each of these violations exists from the date of start of construction of the modification until the time that TVA obtains the appropriate NSR permit and operates the necessary pollution control equipment to satisfy the Tennessee SIP.

ENFORCEMENT

Section 113(a)(1) of the Act provides that at any time after the expiration of 30 days following the date of the issuance of this NOV, the Regional Administrator may, without regard to the period of violation, issue an order requiring compliance with the requirements of the state implementation plan or permit, or bring a civil action pursuant to Section 113(b) for injunctive relief and/or civil penalties of not more than \$25,000 per day for each violation on or before January 30, 1997, and no more than \$27,500 per day for each violation after January 30, 1997.

OPPORTUNITY FOR CONFERENCE

Respondent may, upon request, confer with EPA. The conference will enable Respondent to present evidence bearing on the finding of violation, on the nature of violation, and on any efforts it may have taken or proposes to take to achieve compliance. Respondent has the right to be represented by counsel. A request for a conference must be made within 10 days of receipt of this Notice, and the request for a conference or other inquiries concerning the NOV should be made in writing to:

Angelia Souder Blackwell
Associate Regional Counsel
Environmental Accountability Division
U.S. EPA - Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303
404-562-9527

By offering the opportunity for a conference or participating in one, EPA does not waive or limit its right to

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any remedy available under the Act.

Effective Date

This Notice shall become effective immediately upon issuance.

March 7, 2000
Issuance Date

Winston A. Smith
Winston A. Smith
Director
Air, Pesticides & Toxics
Management Division
EPA Region 4

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EXHIBIT 10
TO DEFENDANTS'
MEMORANDUM OF LAW
IN SUPPORT OF MOTION
FOR PROTECTIVE
ORDER

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

VS.

CINERGY CORP., et al.,

Defendants.

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CAUSE NO. 1:99-cv-1693-LJM/VSS

ENTRY ON PENDING DISCOVERY MOTIONS

This cause is before the magistrate judge on three discovery motions: plaintiffs' Motion to Compel Cinergy to Permit the Public Access to Relevant Documents and to Revise July 7, 2003, Protective Order; the defendants' motion for protective order; and the plaintiffs' Cross-Motion to Compel Responses to Deposition Questions Regarding Cinergy's Environmental Practices and Construction Projects Undertaken After the Filing of the Complaints. The magistrate judge, having considered the briefs of the parties and the arguments of counsel at a recent status conference, rules as follows.

Motion to Compel Public Access

The protective order in this case permits a party to designate a document or portion of deposition testimony as "confidential" if it "contains confidential business or trade secret information and is entitled to confidential treatment pursuant to Fed. R. Civ. P. 26(c)(7), 40 C.F.R. Part 2, Subpart B, 18 U.S.C. § 1905, or any other statute, regulation, applicable court order or rule, or common law rule restricting disclosure." In the plaintiffs' motion to compel, they argue that the defendants have been overzealous in their use of the "confidential" designation. At the magistrate judge's instruction, the plaintiffs have provided numerous examples of clearly improper designations, and after reviewing these examples the magistrate judge understands the plaintiffs'

frustration. However, the magistrate judge also understands that mistakes are an inherent part of any large document production, especially one of the magnitude that the defendants were required to undertake in a relatively short time period.

The question, then, is to what extent the defendants should be required to check for and remedy their mistakes. The plaintiffs argue that the defendants should have to review all of their confidentiality designations, a position which is not entirely unreasonable, but which is impractical given the realities of this litigation.¹ The magistrate judge firmly believes that the burden of such a comprehensive review would far outweigh its benefits to the plaintiffs and to the public. Rather, everyone (including the public) would be better served if those resources were used to keep this case moving toward a final resolution, especially since the vast majority of the documents at issue will never be used in any court filing or proceeding. However, as for those documents that have a reasonable chance of being filed or admitted in court, the magistrate judge believes that the balance of interests requires a review to be conducted, to ensure that only those documents that truly are entitled to confidential status have been so designated. See *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) (recognizing the public's interest "in what goes on at all stages of a judicial proceeding").

Accordingly, the defendants shall review the following documents, in the following order, to determine whether they have been properly designated as confidential:

1. Any document designated confidential that has been filed with the court for any purpose;
2. Any document designated confidential that has been attached to a deposition as an

¹The plaintiffs also argue that certain categories of documents that were created more than five years ago cannot be entitled to protection because they would be of no interest to the defendants' competitors due to their age. The magistrate judge declines to make such a blanket determination.

exhibit;

3. Any document designated confidential that is listed on the plaintiffs' preliminary exhibit list; and
4. Any document designated confidential that is listed on the defendants' preliminary exhibit list.

No document shall retain its confidential designation unless it satisfies the definition of trade secret contained in the Uniform Trade Secrets Act:

... information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
- (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Uniform Trade Secrets Act § 1(4). This review shall be completed by June 13, 2005, with confidentiality logs being provided to the plaintiffs on a rolling basis. These confidentiality logs shall indicate each document reviewed by the defendants and, as to any document for which the confidentiality designation is maintained, a short explanation as to why the defendants believe that is appropriate. In addition, the defendants shall file with the court, also on a rolling basis, a list of any documents that have been filed under seal that the defendants determine are not entitled to confidential status, so that they may be unsealed. In addition, any additional documents designated as confidential that are used in any future depositions or court filings or included on the parties' future exhibit lists shall be subject to the same review process, with a confidentiality log being provided to the plaintiffs within 30 days from the date the documents are used or listed.

Motion for Protective Order and Cross-Motion to Compel

The defendants' motion for protective order and the plaintiffs' Cross-Motion to Compel

Responses to Deposition Questions Regarding Cinergy's Environmental Practices and Construction Projects Undertaken After the Filing of the Complaints both relate to the plaintiffs' desire to question defense witnesses regarding Cinergy's actions after the projects that are at issue in this case. The magistrate judge previously has ruled that information regarding the projects planned by Cinergy in 2004 was not relevant to any of the claims or defenses in this case. However, the plaintiffs have attempted during depositions to question Cinergy employees regarding (1) post-complaint projects that Cinergy has undertaken; (2) planned future projects; and (3) Cinergy's current practices relating to determine whether a particular project requires a permit.

The plaintiffs argue that that "Cinergy's post-complaint component replacement and environmental compliance practices are relevant to its 'fair notice' and related defenses, as well as a means for refreshing the recollections of Cinergy witnesses." It argues that Cinergy's main defense in this case is that the EPA changed its interpretation of the relevant regulations for this lawsuit – or even since this lawsuit was filed – and therefore Cinergy did not have fair notice of the meaning of the regulations at the time the projects at issue were undertaken. Thus, they believe they are entitled to question Cinergy about "whether anyone within Cinergy has discussed the applicability of the regulations to projects undertaken at the plants since the filing of the lawsuit [because t]hose conversations and contemporaneous writings should reflect the impact of the allegedly 'new' interpretation Cinergy claims was revealed only in 1999." In other words, if the EPA really has changed its interpretation of the regulations, there should have been some discussion of those changes and how to react to them within Cinergy, and there should have been a change in how Cinergy decides whether a new project is "routine maintenance" or whether it requires a permit. As for refreshing recollections, the plaintiffs argue that if a witness

is unable to remember, for example, how the decision whether a permit was needed for a particular project was made in the past, they should be able to ask the witness how that decision is made now, and then ask if that decisionmaking process varies from how it was done in the past.

While the plaintiffs' arguments certainly win points for creativity, the magistrate judge remains unconvinced of the relevance of the information they seek. Unless Cinergy plans to rely upon its own post-complaint internal discussions, communications or documents regarding the EPA's position and any change thereof in support of its fair notice defense (or any other claim or defense in this case), those discussions, communications and documents are not discoverable.² While it is not beyond the realm of possibility that the lines of questioning at issue could lead to potentially relevant information, that possibility is outweighed by the burden on the parties and the court of litigating the meaning and import of these post-complaint projects and discussions relating to them. Therefore, the motion for protective order is **GRANTED** and the cross-motion to compel is **DENIED**.

SO ORDERED: 03/21/2005



V. Sue Shields, Magistrate Judge

²It is the magistrate judge's understanding that Cinergy does not plan to rely upon any such post-complaint information. If that understanding is not correct, Cinergy shall file a notice to that effect immediately.

Copies to:³

Scott R. Alexander
Sommer Barnard Ackerson PC
salexander@sbalawyers.com

Christopher D. Ball
New Jersey Office of the Attorney General
christopher.ball@dol.lps.state.nj.us

Deborah Nicole Behles
Us Department of Justice
deborah.behles@usdoj.gov

Alan Jeffrey Birnbaum
Clean Air Task Force
abirnbaum@catf.us

Samuel B. Boxerman
Sidley Austin Brown & Wood LLP
sboxerman@sidley.com; gakers@sidley.com

Kevin P. Auerbacher
New Jersey Dept. of Law & Public Safety
auerbkev@law.dol.lps.state.nj.us

David T. Buente
Sidley Austin Brown & Wood, LLP
dbuente@sidley.com

Robert R. Clark
Sommer Barnard Ackerson, PC
rclark@sbalawyers.com

Larry Martin Corcoran
Environmental and Natural Resources Div.
larry.corcoran@usdoj.gov

Steven David Ellis
Environmental and Natural Resources Div.
steven.ellis@usdoj.gov

Julie L. Ezell
Cinergy Services, Inc.
Julie.ezell@cinergy.com

Richard Mark Gladstein
U.S. Department of Justice
richard.gladstein@usdoj.gov

Thomas Charles Green
Sidley Austin Brown & Wood LLP
tcgreen@sidley.com

Maurice A. Griffin
New Jersey Dept. of Law & Public Safety
maurice.griffin@dol.lps.state.nj.us

Sarah Dale Himmelhoch
U.S. Department of Justice
sarah.himmelhoch@usdoj.gov

R. Keith Guthrie
kgmail@comcast.net

Ann Renfrew Johnston
Law Office of Ann Johnston
annrjohnston@aol.com

Eugene J. Kelly
New York State Attorney General
epaejk@oag.state.ny.us

³The magistrate judge notes that there are seven attorneys of record in this case who still have not provided the court with an email address for distribution purposes, despite the magistrate judge's urging that they do so. As of September 1, 2004, the failure to register to use the court's electronic filing system constitutes a violation of Local Rule 5.7(b). Until these attorneys comply with the local rules and register to receive electronic notification, it will be the responsibility of their co-counsel to ensure that they are aware of the court's entries and orders.

Thomas E. Kieper
U.S. Attorney's Office
tom.kieper@usdoj.gov

James A. King
Porter Wright Morris & Arthur, LLP
jking@porterwright.com

Christine F. Lewis
New Jersey Office of the Attorney General
christine.lewis@dol.lps.state.nj.us

Debra McVicker Lynch
Sommer Barnard Ackerson
dlynch@sbalawyers.com

Carmel Alicia Motherway
Connecticut Attorney General
carmel.motherway@po.state.ct.us

Scott E. North
Porter Wright Morris & Arthur, LLP
snorth@porterwright.com

Jon C. Martin
State of New Jersey
martijon@law.dol.lps.state.nj.us

Jean Patrice Reilly
State of New Jersey
reilljea@law.dol.lps.state.nj.us

Robert T. Rosenthal
New York Attorney General's Office
robert.rosenthal@oag.state.ny.us

Jeffrey K. Sands
U.S. Department of Justice
jeffrey.sands@usdoj.gov

Jose A. Suarez
Office of the Attorney General
jose.suarez@po.state.ct.us

Kathryn B. Thomson
Sidley Austin Brown & Wood, LLP
kthomson@sidley.com

Gaylene Vasaturo
U.S. Environmental Protection Agency
vasaturo.gaylene@epa.gov

John D. Papageorge
Sommer Barnard Ackerson
jpapageorge@sbalawyers.com
csmith@sbalawyers.com

J. Jared Snyder
Office of the Attorney General
jared.snyder@oag.state.ny.us

Frank R. Volpe
Sidley Austin Brown & Wood LLP
fvolpe@sidley.com

Stephen Gerard Vitelli
Connecticut Attorney General's Office
stephen.vitelli@po.state.ct.us

Crissy Lyn Pellegrin
Environmental Protection Agency
pellegrin.crissy@epa.gov
cpellegrin_sammarco@hotmail.com

EXHIBIT 11
TO DEFENDANTS'
MEMORANDUM OF LAW
IN SUPPORT OF MOTION
FOR PROTECTIVE
ORDER

**GLOSSARY OF ACRONYMS REFERENCED IN DEFENDANTS'
MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PROTECTIVE ORDER**

CAA	Clean Air Act
EPA	United States Environmental Protection Agency
GADS	Generator Availability Data System
MDEQ	Michigan Department of Environmental Quality
NNSR	Non-Attainment New Source Review
NOI	Notice of Intent to Sue
NOV	Notice and Finding of Violation
NPCA	National Parks Conservation Association
NSR	New Source Review
PSD	Prevention of Significant Deterioration
RMRR	Routine Maintenance, Repair and Replacement
SIP	State Implementation Plan
TVA	Tennessee Valley Authority